(1)

No. 89-1165

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1989

SOUTHWEST FOREST INDUSTRIES, INC.,
Petitioner,

v.

JOHN L. SUTTON,
Respondent.

Petition for Writ of Certiorari To The United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

The United States Court of Appeals for the Tenth Circuit, purporting to apply Kansas law in a diversity action, upheld the imposition on Petitioner Southwest Forest Industries, Inc., of one million dollars in punitive damages for the allegedly wrongful discharge in July, 1982, of Petitioner John L. Sutton, an employee who was protected against unjust discharge by a collective bargaining agreement that also provided for a grievance-arbitration procedure. The court below reached that result despite two significant considerations: (1) Sutton had been discharged six years before any Kansas court had recognized a cause of action for the retaliatory discharge of an employee enjoying such contractual protections. (2) Under Kansas law, employers had been protected against the imposition of punitive damages based on tort liability created only after disputed discharges had occurred; consequently, Kansas courts had barred punitive damage awards against other employers similarly circumstanced as Southwest.

Whether *Erie R.R. Co. v. Tompkins*, 304 U.S. 68 (1938), bars a federal court in a diversity action from imposing punitive damages on an employer when that result is inconsistent with both (1) a published decision of an intermediate appeals court of the state whose law governs the action and (2) an unpublished decision of a trial court in that state.

STATEMENT PURSUANT TO RULE 28.1

STONE CONTAINER CORPORATION*
SCHEDULE OF SUBSIDIARIES AND AFFILIATES

OPERATING SUBSIDIARIES:	PARENT:
First Tier Subsidiaries:	
Abbeville-Grimes Railway Corporation	Stone Container Corporation
Cameo Container Corporation	Stone Container Corporation
Consolidated Bathurst	Stone Container Corporation
Great Southern Box Company, Inc.	Stone Container Corporation
SFI Merger Corporation	Stone Container Corporation
Stone Connecticut Paperboard Corporation	Stone Container Corporation
Stone Connecticut Paperboard Properties, Inc.	Stone Container Corporation
Stone Container Accurate Corrugated Corporation	Stone Container Corporation
Stone Container International Corporation	Stone Container Corporation
Stone Export Trading Company	Stone Container Corporation
Stone Mill Operating Corporation	Stone Container Corporation
Stone Packaging Systems, Inc.	Stone Container Corporation
Stone Resource & Energy Corporation	Stone Container Corporation

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* Petitioner Southwest Forest Industries, Inc., is no longer the corporate entity liable for the judgment. The successor in liability to the judgment in this case is Stone Southwest Corporation, which is a wholly owned subsidiary of Stone Container Corporation.

STONE CONTAINER CORPORATION
SCHEDULE OF SUBSIDIARIES AND AFFILIATES (cont'd)

OPERATING SUBSIDIARIES:	PARENT:
Stone Southwest Corporation	Stone Container Corporation
*Strong-Robinette Bag Company, Inc.	Stone Container Corporation
Trinity Paper & Plastics Corporation	Stone Container Corporation
Second Tier Subsidiaries:	
Apache Railway Corporation	Stone Southwest Corporation
Atlanta & Saint Andrews Bay Railway Company	Stone Southwest Corporation
Cousins Leasing Corporation	Great Plains/ Samson Bag Corp.
Great Plains/Samson Bag Corp.	Stone Southwest Corporation
Manufacturers Folding Carton, Inc.	**Stone Accurate
Stone Corrugated, Inc.	Stone Southwest Corporation
Stone Hodge, Inc.	Stone Southwest Corporation
Stone Hopewell, Inc.	Stone Southwest Corporation
SWF Insurance Company	Stone Southwest Corporation

* To be dissolved.
** Represents 80% ownership by Stone Accurate.

STONE CONTAINER CORPORATION
SCHEDULE OF SUBSIDIARIES AND AFFILIATES (cont'd)

NON-OPERATING SUBSIDIARIES:	PARENT:
Ace Box Company, Inc.	Stone Container Corporation
Central Louisiana & Gulf Railway Corporation	Stone Container Corporation
Charter Oaks Containers, Inc.	Stone Container Corporation
Gulf Container Corporation	Stone Container Corporation
National Packaging Corporation	Stone Container Corporation
North Louisiana & Gulf Railway Corporation	Stone Container Corporation
Penn Central Containers, Inc.	Stone Container Corporation
South Carolina Industries Corp.	Stone Container Corporation
Southwest Forest Industries, Inc.	Stone Container Corporation
Southwest Kenworth, Inc.	Stone Southwest Corporation
Stone Communications Corporation	Stone Container Corporation
Tarheel Container Corporation	Stone Container Corporation

AFFILIATES:

L & M Container Corporation - 50%
*Seminole Kraft Corporation - 49%
Stone Forest Industries, Inc. - 49%
Stone - H & H Packaging Corporation - 49%
Stone Savannah River Pulp & Paper Corporation - 50%

* Orangeburg Trucking, Inc. (SC) is a wholly-owned subsidiary of Stone Forest Industries, Inc.

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SOUTHWEST FOREST INDUSTRIES, INC.,
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Southwest Forest Industries, Inc., ("Southwest") petitions for a writ of certiorari and asks this Court to vacate the judgment of the United States Court of Appeals for the Tenth Circuit insofar as that judgment affirms an award of punitive damages against Southwest.

OPINIONS BELOW

The opinion of the court of appeals (Appendix, App. B, at 2a) is reported at 868 F.2d 352. The opinion of the district court (Appendix, App. D, at 12a) is reported at 643 F.Supp. 662.

JURISDICTION

This case, originally filed in a Kansas court, was, on the basis of diversity jurisdiction, removed by Southwest to the United States District Court for the District of Kansas. 28 U.S.C. §1332. Southwest was a citizen of Nevada; Sutton, of Kansas.

The order of the Tenth Circuit Court of Appeals affirming the judgment of the district court was entered on February 10, 1989. A timely petition for rehearing, with suggestion for rehearing *en banc*, was denied by the Tenth Circuit on October 26, 1989. (*See* Appendix, App. A, at 1a). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE

The Rules of Decision Act, 28 U.S.C. §1652, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

SUMMARY STATEMENT

This case involves a familiar kind of situation that implicates basic requirements of our federal system: In a diversity action, a party advises a federal district court of a pertinent published opinion by an intermediate appellate court, of the state whose law governs the action. (That opinion set forth and applied a rule barring punitive damages in situations like that presented in the diversity case.) The familiar question is what force should federal courts give to such opinions of a state court.

In this diversity case, the United States District Court for the District of Kansas reached a result incompatible with the rule embodied in the published opinion of the state appellate court. Indeed, in another action, involving different parties, a state trial court, on the authority of the same state appellate opinion, subsequently rejected a claim for punitive damages in a case on all fours with the diversity action in the Kansas federal district court. Nevertheless, the United States Court of Appeals for the Tenth Circuit upheld the punitive-damages award.

Furthermore, Southwest's petition for rehearing advised that court, *inter alia*, of the intervening, unpublished and indistinguishable opinion of the state trial court, rejecting punitive damages. The Tenth Circuit, however, denied that petition without comment.

STATEMENT

This case arose out of Southwest's discharge on July 9, 1982, of John L. Sutton ("Sutton"), who was protected against unjust discharge by a collective bargaining agreement that also provided for a grievance procedure culminating in binding arbitration.

Sutton originally sued in a Kansas court, alleging that he had been wrongfully discharged for having filed workers' compensation claims. His suit was removed to the federal district court, on the basis of the parties' diversity of citizenship. While this case was pending before that court, Kansas' cause of action for retaliatory discharge did not apply to an employee protected by just cause and grievance arbitration provisions of a collective bargaining agreement, as distinguished from an at-will employee. See *Murphy v. City of Topeka*, 630 P.2d 186, 189 (1981)(set forth in Appendix, App. E at 22a). *See also Armstrong v. Goldblatt Tool Co.*, 747 P.2d 119, 123 (1987); *Smith v. United Technologies*, 731 P.2d 871, 880 (1987); *Cox v. United Technologies*, 727 P.2d 456, 457 (1986). Nevertheless, the district court concluded that Sutton, even though he had enjoyed such contractual protections, could, under Kansas law, maintain a claim for retaliatory discharge.

On October 28, 1985, that court entered judgment for Sutton on the jury's verdict for $250,000 actual, and $1,000,000 punitive, damages. *See* Judgment on Jury Verdict (Appendix, App. C, at 11a).

While Southwest's appeal to the United States Court of Appeals for the Tenth Circuit was pending, the Kansas Supreme Court, on October 31, 1986, held (with one justice dissenting) that the cause of action created by *Murphy* for retaliatory discharge for *at-will* employees did not apply to employees protected by just cause and grievance arbitration provisions of a collective bargaining agreement. *See Cox*, 727 P.2d at 459.

Shortly thereafter, the Kansas Supreme Court unequivocally reaffirmed that rule of Kansas law. *See Smith*, 731 P.2d at 880. On February 12, 1987, relying on *Cox*, the Tenth Circuit in this case summarily reversed the judgment below and ordered dismissal of Sutton's action. The district court complied on February 23, 1987.

Sutton petitioned the Tenth Circuit for a rehearing and a stay of proceedings, pending the Kansas Supreme Court's consideration in *Armstrong*, 747 P.2d 119, of constitutional challenges to its decision in *Cox*. The constitutional contentions were that denying a cause of action for retaliatory discharge to employees contractually protected against dismissal, while granting one for employees lacking such protections, denied unionized workers due process of law, equal protection, and their rights to free association under the First Amendment. On December 11, 1987, the Kansas Supreme Court, in *Armstrong*, (with three justices dissenting), rejected those contentions and unequivocally reaffirmed *Cox* and affirmed the dismissal of the plaintiff's case. In light of *Armstrong*, the Tenth Circuit, on January 20, 1988, lifted its previous stay of proceedings. On that date, the Kansas Supreme Court denied rehearing in *Armstrong*, and, on February 22, 1988, the Tenth Circuit denied Sutton's petition for rehearing.

On March 25, 1988, the Kansas Supreme Court, in *Coleman v. Safeway Stores, Inc.*, 752 P.2d 645, 652 (1988),[1] overruled its three recent decisions—*Cox*, *Smith*, and *Armstrong*—and recognized for the first time a cause of action under Kansas law for retaliatory discharge for an employee, like Sutton, who was

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[1] Prior to that decision, Kansas lower courts in *Cox*, *Smith*, *Armstrong*, and *Coleman* had uniformly concluded that, under Kansas law, there was no cause of action for retaliatory discharge of an employee protected by a collective bargaining agreement that barred unjust dismissals and provided for a grievance procedure culminating in binding arbitration. Indeed, all the trial courts in those four cases had considered that rule so clear and established that they had granted summary judgment to the defendant-employers. *See Coleman*, 752 P.2d at 646; *Armstrong*, 747 P.2d at 120; *Smith*, 731 P.2d at 873; *Cox*, 727 P.2d at 456. Southwest is not aware of *any* pre-*Coleman* Kansas case in which such a claim was recognized.

protected by just cause and grievance-arbitration provisions of a collective bargaining agreement.

After the Kansas Supreme Court's decision in *Coleman*, the Tenth Circuit, on May 10, 1988, granted Sutton's motion to recall the Tenth Circuit's mandate. In *Armstrong*, the Kansas Supreme Court had also granted the plaintiff's motion to recall the mandate. However, on August 10, 1988, five months after *Coleman* was decided, the Kansas Supreme Court reissued its mandate in *Armstrong*, denying any damages whatsoever to the plaintiff, notwithstanding *Coleman*.

In its supplemental briefs to the Tenth Circuit regarding the impact, if any, of *Coleman* on this case, Southwest made the following submissions: Under Kansas law, as formulated and applied in *Murphy*, punitive damages could not retroactively be imposed on a defendant on the basis of the new tort recognized for the first time in *Coleman;* for under Kansas law a prerequisite for such punitive-damages liability was that Southwest, when it discharged Sutton, "clearly knew" that its action would result in tort liability and that prerequisite had not been satisfied in this case.

Nonetheless, on February 10, 1989, a panel of the Tenth Circuit upheld the punitive-damages award, even though the allegedly tortious discharge of Sutton had occurred approximately one year after *Murphy* and six years before the Kansas Supreme Court had decided *Coleman*. *See* Appendix, App. B, at 10a.

Southwest's timely petition for rehearing, with suggestion for rehearing *en banc*,[2] advised the Tenth Circuit of the intervening trial court decision in *Coleman*, on remand, (*"Coleman II"*), rendered on January 11, 1989 (*Coleman v. Safeway Stores*, No. 85 C 2021 (District Court of Sedgwick County, Kansas, January 11, 1989)(Rustin, J.), set forth in Appendix, App. F, at

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[2] Southwest filed a petition, with suggestion for rehearing *en banc*, on March 6, 1989. Subsequently, the Tenth Circuit extended the time for filing such a petition; accordingly, Southwest withdrew its original petition and filed another one, on June 15, 1989.

31a). That court held that Kansas law barred the retroactive award of punitive damages to an employee protected against unjust discharge by the grievance arbitration provisions of a collective bargaining agreement, who had been discharged before the Kansas Supreme Court's recognition in *Coleman* of a new cause of action for retaliatory discharge of such contractually protected employees. *See* Appendix, App. F, at 42a-43a. Interpreting *Murphy* just as Southwest had in its prior briefing in this case, the trial court in *Coleman II* stated:

> What has been sent down by the [Kansas] Supreme Court on a retrial is the overruling of certain cases. And allowing the wrongful discharge, retaliatory discharge case involving contract employees. It was my understanding this did not exist prior to the time of the *Coleman case* . . . And I will follow the logic and the reasoning that is in *Murphy*, the *Murphy* case. 6 Kansas Appellate, 488, in saying that I really do believe in this case, *a case of first impression coming down from the Supreme Court, concerning contract employees, and their rights, that it would be unjust and unfair* to the defendant to be subject to punitive damages. That will be the order of the Court.

Appendix, App. F, at 42a-43a (emphasis added). *Coleman II* is indistinguishable from this case.

Southwest's petition for rehearing had also presented, *inter alia*, the following argument: The panel had violated *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), by failing to give effect to Kansas law as spelled out and applied in *Murphy* and reinforced by *Coleman II*, and by failing, as a result, to shield Southwest against punitive damages. Southwest requested the Tenth Circuit, if it still had any doubt about the impact on this case of *Murphy* and *Coleman II*, to certify that question to the

Kansas Supreme Court.[3] The Tenth Circuit denied that petition, without comment. *See* Appendix, App. A, at 1a.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS VIOLATED THE PRINCIPLE OF *ERIE R.R. CO. v. TOMPKINS* AND DENIED EQUAL PROTECTION TO SOUTHWEST BY IGNORING AND MISAPPLYING CONTROLLING STATE COURT DECISIONS THAT FORECLOSED A PUNITIVE-DAMAGE AWARD IN THIS DIVERSITY CASE

The Tenth Circuit in its original panel opinion, ignored and misapplied Kansas law, as announced and applied in *Murphy*. As more fully developed below, the Tenth Circuit failed to apply the rule embodied in *Murphy*, 630 P.2d at 193, — a published decision by an intermediate Kansas appellate court. Following the Tenth Circuit's opinion in this case, the Kansas trial court in *Coleman II* provided additional evidence that the federal courts below had misapplied the governing state law. Nonetheless, the Tenth Circuit refused to grant a rehearing in order to consider the significance of *Coleman II*, and to correct its own error regarding *Murphy*. This refusal conflicts with this Court's approach and decisions in *Exxon v. Banque de Paris*, 109 S.Ct 299 (1988), and in *King v. Order of United Commercial Travelers*, 333 U.S. 153 (1948). The Tenth Circuit's determinations are also in conflict with decisions of other circuit courts of appeals, cited *infra* at p. 12 and note 5. Those decisions have recognized that, in diversity actions, federal courts are under a continuing duty to ascertain and to apply, from "all available data," including unpublished state trial court opinions, the correct state law to

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[3] Southwest's counsel in the original appeal reports as follows: At oral argument, one of the panel's members inquired whether the parties wished to certify to the Kansas Supreme Court the question of whether *Coleman* should be applied retroactively so as to provide a basis for any claim at all by Sutton. Southwest's counsel stated that, although Southwest did not think such certification was necessary, it would not object to certification. The issue of the certification of the question of the impact of *Murphy* on Sutton's ability to recover punitive damages was never raised in oral argument before the Tenth Circuit.

the case *sub judice*. The Tenth Circuit's breach of that well-established duty calls for the grant of certiorari, and the reversal by this Court of the punitive damages portion of the judgment below.

The "available data" — *Murphy* and *Coleman II* — make it clear that the governing Kansas rule is that punitive damages may not be imposed on an employer who discharged an employee before judicial recognition of the tortious character of that discharge and who did not "clearly know" that such a discharge could give rise to tort liability. *Murphy*, 630 P.2d at 193 (Appendix, App. E, at 30a). As the *Murphy* court explained:

> [I]nasmuch as this is the first recognition to such a cause by a Kansas court of appellate jurisdiction, we believe the allowance of punitive damages in this case would be extremely unjust . . . . Until the present pronouncement, *it was not clearly known to defendants, or any other employer in this state,* that a retaliatory discharge would give rise to an action for damages. Therefore, defendants' conduct in the present case does not justify the imposition of punitive damages.

630 P.2d at 193 (Appendix, App. E, at 30a)(emphasis added). Under *Murphy*, Southwest was shielded against punitive damages. Sutton was protected by the just cause and grievance-arbitration provisions of a collective bargaining agreement, when he was discharged in July, 1982. At that time, Kansas' cause of action for retaliatory discharge was limited to at-will employees. *Murphy*, 630 P.2d at 189, 192 (Appendix, App. E, at 29a). *See also Armstrong*, 747 P.2d at 123; *Smith*, 731 P.2d at 880; *Cox*, 727 P.2d at 457-59. Hence, neither Southwest nor other Kansas employers could have "clearly known" that they would be liable in tort for discharging employees enjoying such contractual protections.

The court below was required to apply the rule of Kansas law, which governed this diversity action, regarding the imposition of punitive damages for conduct that occurred prior to the time that it was declared tortious for the first time by the Kansas Supreme Court in *Coleman*. *See Erie*, 304 U.S. at 78;

Rules of Decision Act, 28 U.S.C. §1652. There was no directly controlling decision on this issue by the Kansas Supreme Court. Consequently, the Tenth Circuit was required to ascertain from "all available data" how the Kansas Supreme Court would have resolved the question of whether punitive damages should be retroactively imposed on Southwest for conduct not known to be tortious when it occurred. *See Grantham & Mann v. American Safety Products, Inc.*, 831 F.2d 596, 608 (6th Cir. 1987). *See also Commissioner v. Estate of Bosch*, 387 U.S. 456, 462-66 (1967); C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, §4507 (2d ed. 1982). Where, as here, there was a controlling intermediate appellate state court decision, *see Murphy*, 630 P.2d 186, the Tenth Circuit was required to respect that decision "unless it . . . [was] convinced by other persuasive data that the highest court of the state would decide otherwise." *Hicks v. Feiock*, 108 S.Ct. 1423, 1428, n.3 (1988), *quoting West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237-38 (1940). Only last term the vitality of that principle was confirmed by this Court's decision in *Exxon*, 109 S.Ct. at 299.

In its original panel opinion, the Tenth Circuit failed, however, to respect that principle; that court did not even suggest that the Kansas rule applied in *Murphy* had ever been called into question by any Kansas court.[4] The Tenth Circuit did not even address the question of whether Kansas law, authoritatively formulated in *Murphy*, precluded the retroactive award of punitive damages for a newly created tort. Nor did it address the question of whether the Kansas Supreme Court had in *Coleman* created a new tort. Rather, the panel simply asserted that "*Murphy* provided Southwest with sufficient notice of the potential for an award of punitive damages well over a year before Sutton was discharged." 868 F.2d at 356 (Appendix, App. B, at 9a). This conclusory assertion was apparently based on

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[4] Southwest is unaware of any Kansas decision questioning the rule that served as a basis for denying punitive damages in these two cases. Moreover, that rule is reinforced by virtue of its acceptance by many other jurisdictions. *See, e.g., Clanton v. Cain-Sloan Co.*, 677 *S.W.2d* 441 (Tenn. 1984); *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984); *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353 (1978); *Nees v. Hocks*, 272 Or 210, 536 P.2d 512 (1975).

the view that *Murphy* had created a common law cause of action for retaliatory discharge for all classes of employees. Even a cursory reading of that decision demonstrates that *Murphy* recognized a cause of action only for at-will employees and, correspondingly, that the contrary assumption that apparently was the basis for the panel's opinion in this case was inconsistent with the law of Kansas. As the *Murphy* court succinctly stated, the narrow question before it was:

> [D]oes a cause of action exist in this state for an *employee-at-will* who is terminated by his employer for filing a workmen's compensation claim?

630 P.2d at 189 (emphasis added) (Appendix, App. E, at 22a). *See also* 630 P.2d at 192 (Appendix, App. E, at 27a-28a).

The unsoundness of the panel's assumption, as well as Southwest's lack of the knowledge indispensable for the valid imposition of punitive damages under Kansas law, was underscored by decisions of the Kansas Supreme Court interpreting *Murphy*. *See Armstrong*, 747 P.2d at 121-22; *Smith*, 731 P.2d at 880; *Cox*, 727 P.2d at 457-59. As the Kansas Supreme Court observed in *Cox*:

> Recognition of the tort of retaliatory discharge for filing of a workers' compensation claim, by the Court of Appeals in *Murphy*, *judicially created a remedy for a class of employees having no contractual remedy.*

727 P.2d at 457 (emphasis added). Moreover, that court observed that the issue before it — whether to recognize a cause of action for retaliatory discharge for employees protected by a collective bargaining agreement — was *"one of first impression in this state." Id.* (emphasis added). *See also Armstrong*, 747 P.2d at 123 ("The rule established in *Murphy* and subsequently followed in Kansas was a judicially created rule *applicable only to at-will employees* in order to protect the at-will employee from discharge in violation of some public policy of this state")(emphasis added). In short, the Kansas Supreme Court, like the lower Kansas courts, had clearly and consistently recognized that the tort created by *Murphy* did not embrace employees protected by

just cause and grievance-arbitration provisions of a collective bargaining agreement.

The Tenth Circuit suggested, however, that Southwest could not have relied on those Kansas decisions because they had not been announced until after Sutton's discharge and after entry of the judgment by the trial court below. 868 F.2d at 355 (Appendix, App. B, at 6a). That suggestion plainly misses the crucial issue. The crucial issue was not whether Southwest had relied on those decisions, but rather whether Southwest "clearly knew" that its discharge of Sutton, when he was protected as he was by collectively-bargained-for just cause and grievance-arbitration provisions, would be the basis for a retaliatory discharge action. The decisions from *Murphy* to *Coleman*, even though not relied on by Southwest, made it abundantly clear that Southwest could not have had the knowledge that *Murphy* made a prerequisite for inflicting a punitive damage award on a defendant, such as Southwest. Nonetheless, the Tenth Circuit, in its original panel opinion, upheld such an award and denied Southwest the protection of the governing Kansas rule, even though that rule had been authoritatively expressed and applied by an intermediate Kansas appellate court in a published opinion. That decision by the Tenth Circuit manifestly frustrates the purpose of the *Erie* doctrine.

> In essence, the intent of [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, as far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.

Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

The Tenth Circuit, in its response to Southwest's petition for a rehearing, appeared equally indifferent to Kansas law, as applied in *Coleman II*, as well as in *Murphy*. That petition advised the Tenth Circuit of the content and rationale of the intervening state trial court decision in *Coleman II*. That decision has been rendered after the Kansas Supreme Court had, in *Coleman*, recognized for the first time a cause of action for retaliatory

discharge for contractually protected employees, such as Sutton. Granted, the Tenth Circuit was not bound to follow an unpublished trial court decision, such as *Coleman II,* even though it was on all fours with the instant case. But that court, in resolving the issue before it, should have considered and treated that opinion as evidence bearing on how the Kansas Supreme Court would resolve the same. *MGM Grand Hotel, Inc. v. Imperial Glass Co.,* 533 F.2d 486, 489 n.5 (9th Cir. 1976)(unpublished trial court opinion). *Accord Estate of Bosch,* 387 U.S. at 465 (trial court opinion); *King,* 333 U.S. at 160-61 (unpublished trial court opinion).[5] *See also Exxon,* 108 S.Ct. 299; *Huddleston v. Dwyer,* 322 U.S. 232, 236 (1944); *Vandenbark v. Owens-Illinois Co.,* 311 U.S. 538, 543 (1941). There is nothing to suggest that the Tenth Circuit met that requirement in disposing of the petition for rehearing. On the contrary, that court, in denying Southwest's petition for rehearing, appears to have ignored *Coleman II* (just as it had previously ignored *Murphy*).

Given the Tenth Circuit's disregard of Kansas law in both its panel opinion and in its disposition of Southwest's petition for a rehearing, this case is not materially different from, and is controlled by, *Exxon,* 109 S.Ct. 299. There, a petition for certiorari submitted that the Fifth Circuit had violated *Erie* by refusing to follow an intervening unpublished decision of the Texas Appellate court, on all fours with the situation presented in *Exxon.* This Court granted certiorari even though Texas had

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[5] *See also Carpenters Health & Welfare Fund v. Kenneth R. Ambrose, Inc.,* 727 F.2d 279, 283 (3d Cir. 1983) (trial court opinion); *Gatewood v. Fiat, S.P.A.,* 617 F.2d 820, 825 (D.C. Cir. 1980) (unpublished trial court opinion); *Bradley v. GMC,* 512 F.2d 602, 605 (6th Cir. 1975) (unpublished trial court opinion); *Royal Indemnity Company v. Clingan,* 364 F.2d 154, 158 (6th Cir. 1966) (unpublished trial court opinion); *Parks v. New York Times Co.,* 308 F.2d 474, 479 (5th Cir. 1962) (trial court opinion); *Duling v. Markun,* 231 F.2d 833, 838 (7th Cir. 1956) (unpublished trial court opinion); *Fiat Motors v. Wilmington,* 619 F.Supp. 29, 32 (D. Del. 1985) (trial court opinion); *Amis Construction Co. v. Pressed Steel Tank,* 279 F.Supp. 83, 85 (E.D. Wisc. 1968) (trial court opinion); *Fred Meyer, Inc. v. Central Mutual Insurance Co.,* 235 F.Supp. 540, 543 (D. Ore. 1964) (trial court opinions); *Henry v. United States Trucking Corporation,* 161 F.Supp. 67, 71 n.1 (D. N.J. 1958) (trial court opinion); *York v. Smith,* 43 B.K. 36, 37-38 n.1 (M.D. Tenn. 1984) (unpublished intermediate court opinion).

a rule barring citation to unpublished Texas state court opinions.[6] To be sure, *Exxon* involved an intervening decision rendered by an appellate, not a trial, court.[7] But here the Tenth Circuit

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[6] In his Response to Southwest's Petition for Rehearing, Sutton contended that the Tenth Circuit's Rule 36.3 and the Kansas Supreme Court's Rule 7.04 precluded Southwest from citing *Coleman II* to the Tenth Circuit and the Tenth Circuit from considering that unpublished ruling. That contention, however, was based on an overbroad reading of Rule 36.3. That rule, which provides that "[u]npublished opinions and orders and judgments *of this court* have no precedential value and shall not be cited, or used by any court within the Tenth Circuit" (emphasis added), bars citation of only the Tenth Circuit's unpublished decisions, and not the unpublished decisions of other courts. But even if that rule had been as broad as Sutton urged, it could not have barred Southwest from citing, and the Tenth Circuit from considering, *Coleman II*. For such a bar would have been inconsistent with the Tenth Circuit's duty under *Erie* to consider "all available data," *see supra* at 9, in determining Southwest's substantive rights under Kansas law. Consequently, Rule 36.3, had it sought to impose a bar against consideration of *Coleman II*, would have been contrary to, and unenforceable under, the Rules Enabling Act, 28 U.S.C. §2072.

Nor does the Kansas Supreme Court's procedural Rule 7.04 operate to block citations of unpublished opinions in diversity actions, for two reasons. First, that rule bars only citation to Kansas appellate court decisions marked "Not Designated for Publication," and, hence, *Coleman II* does not fall within the scope of that rule. Second, in diversity actions, federal courts follow their own procedural rules in determining and applying state substantive law. *See Hanna v. Plumer*, 380 U.S. 460, 465-67 (1965). Federal courts cannot be expected to be as knowledgeable about state law as are state courts and, hence, state rules of procedure cannot deny federal courts, in diversity actions, access to pertinent state decisions, published or unpublished, that bear on the content of state substantive law. Thus, in *Exxon*, this Court granted certiorari after the Fifth Circuit had refused, because a Texas rule of appellate procedure barred citation of, and reliance on, unpublished decisions, to consider an unpublished opinion of a Texas appellate court. *Exxon* is this case. Here too, it would be fundamentally incompatible with the *Erie* principle to foreclose, on the basis of a state procedural rule, consideration by a federal court of an unpublished, but accessible, state court decision, which applied and explained governing state law.

[7] In that case, the Texas appellate court decision was ultimately published—thereby mooting the issue of whether the Fifth Circuit had a duty to follow an unpublished opinion. After being informed that that opinion had been published, this Court summarily vacated the Fifth Circuit's decision in *Exxon*, and remanded for further consideration in light of the intervening published state court decision.

not only ignored the trial court decision in *Coleman II,* but also ignored and misapplied *Murphy*, a published Kansas appellate court decision. Furthermore, even if the unpublished *Coleman II* decision had stood alone, the Tenth Circuit would not have been free to completely disregard it. *See* cases cited *supra* at 12 and note 5. Finally, the Tenth Circuit, by its failure to follow *Murphy*, coupled with its apparent refusal to give any weight to *Coleman II,* has denied Southwest the benefit of the substantive law that would have governed Sutton's claim for punitive damages had his action been tried in state court.[8] That denial manifestly strikes at the heart of *Erie*.

The Tenth Circuit's infidelity to the *Erie* principle is underscored by the striking disparity in the results reached by Kansas courts and the result reached by the Tenth Circuit in this case. For that Circuit upheld the infliction of punitive damages on Southwest, whereas the Kansas courts had shielded similarly circumstanced employer-defendants against precisely that kind of punishment in four cases, namely, in *Smith, Cox, Armstrong,* and *Coleman*. All of those cases, except *Smith,* involved discharges post-dating Sutton's discharge. Nonetheless, the Kansas courts did not inflict punitive damages on any of these defendants. The disparate and onerous penalty inflicted on Southwest is manifestly inconsistent with the responsibilities of a federal court under *Erie* to accord equal protection to litigants in diversity cases, such as Southwest, by applying to them the same law that the state courts would have applied to those litigants, such as Southwest, and had indeed applied to identically situated litigants. This Court has made that point crystal clear:

> Diversity jurisdiction is founded on assurances to non-resident litigants of courts free from susceptibility to potential bias . . . . *And so Congress afforded out-of-state litigants another tribunal, not another body of*

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[8] Moreover, the Tenth Circuit could have easily avoided this entire conflict by certifying this question, as Southwest had requested, to the Kansas Supreme Court. The Tenth Circuit's tacit refusal to certify to the Kansas Supreme Court the question of whether Kansas law would permit the retroactive award of punitive damages is further evidence of the Tenth Circuit's indifference to Kansas law in this case.

> *law.* The operation of a double system of conflicting laws in the same state is plainly hostile to the reign of law.

Guaranty Trust Co., 326 U.S. at 112 (emphasis added). This Court should, we submit, review and correct the Tenth Circuit's egregious failure to apply the law of Kansas, rather than "another body of law."

CONCLUSION

For the reasons set forth above, this Court should grant certiorari in this case and correct the error below by vacating the punitive-damages portion of the judgment below and remanding this case to the Tenth Circuit, with directions that it reconsider its decision in the light of the applicable and controlling Kansas law.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN L. SUTTON

Plaintiff-Appellee,

v. No. 86-1183

SOUTHWEST FOREST INDUSTRIES,

Defendant-Appellant.

ORDER

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BREORBY, EBEL, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: _____

Patrick Fisher
Chief Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN L. SUTTON

Plaintiff-Appellee,

v. No. 86-1183

SOUTHWEST FOREST
INDUSTRIES,

Defendant-Appellant.

February 10, 1989

Appeal from the
United States District Court
for the District of Kansas

Williams R. McKibbon, Jr. (Charles L. House, Gilbert P. Bourk III and Douglas C. Beach, with him on the briefs), of Haynsworth, Baldwin, Miles, Johnson, Greaves and Edwards, Greenville, S.C. for defendant-appellant.

David W. Hauber (Kenneth J. Reilly and Elinor P. Schroeder, with him on the briefs), of Boddington & Brown, Kansas City, Kan., for plaintiff-appellee.

Before McKAY, SEYMOUR, and BALDOCK, Circuit Judges.

SEYMOUR, Circuit Judge.

Plaintiff, John L. Sutton, a former employee of defendant Southwest Forest Industries (Southwest), brought this diversity action for damages, alleging retaliatory discharge for filing worker's compensation claims. After a jury verdict for Sutton, the district court, 643 F.Supp. 662, denied Southwest's motion for judgment notwithstanding the verdict and Southwest appealed. While this appeal was pending, the Kansas Supreme Court issued several decisions addressing whether an employee

covered by a collective bargaining agreement could bring a tort action for retaliatory discharge. Among other issues, Southwest asks us to hold that the latest Kansas decision, which reversed prior decisions on which Southwest relied, should not be applied retroactively in this appeal. We conclude instead that the most recent Kansas decision on this issue should be applied retroactively here. We are not persuaded by Southwest's other contentions, and we therefore affirm.

I.

Sutton was employed by Southwest from September 1978 until July 1982. He initially brought this action in Kansas state court, claiming that Southwest discharged him in retaliation for having filed worker's compensation claims. The action was subsequently removed to the United States District Court for the District of Kansas and a jury trial was held in October 1985. At the time of trial, only the Kansas Court of Appeals had ruled on the existence of an action in tort for retaliatory discharge. *See Murphy v. City of Topeka-Shawnee County Department of Labor Services*, 6 Kan.App. 2d 488, 630 P.2d 186 (1981). The court held there that Kansas law permits an employee to bring a cause of action in tort for a termination based on the filing of worker's compensation claims. *Id.* 630 P.2d at 193. The plaintiff in *Murphy* was an employee-at-will. *Id.* 630 P.2d at 190. Southwest argued unsuccessfully to the district court that *Murphy* was inapplicable to the present case because Sutton was covered by a collective bargaining agreement.

The jury returned a verdict for Sutton, awarding him $250,000 in actual damages and $1,000,000 in punitive damages. Southwest appealed the judgment to this court in January 1986. During the pendency of this appeal, the Kansas Supreme Court issued decisions supporting Southwest's argument that a tort action for retaliatory discharge was not available to employees covered by collective bargaining agreements. *See Cox v. United Technologies, Essex Group, Inc.*, 240 Kan. 95, 727 P.2d 456, 459 (1986); *Smith v. United Technologies, Essex Group, Inc.*, 240 Kan. 562, 731 P.2d 871, 880 (1987). Southwest filed a motion for summary reversal of the district court judgment, urging that the *Cox* and *Smith* decisions governed the present appeal. In response, Sutton

argued that the application of those cases by this court would violate his constitutional rights. This court rejected these constitutional claims and granted Southwest's motion for summary reversal on February 12, 1987, remanding the action to the district court with instructions to dismiss. Pursuant to this court's mandate, the district court dismissed the action on February 23, 1987.

Sutton timely filed a petition for rehearing with suggestion for rehearing en banc with this court, again claiming that application of *Cox* and *Smith* would violate his constitutional rights. While this petition for en banc review was pending, the Kansas Supreme Court agreed to review similar constitutional challenges to its *Cox* and *Smith* decisions in an unrelated case. *See Armstrong v. Goldblatt Tool Co.*, 242 Kan. 164, 747 P.2d 119 (1987). We granted Sutton's petition to stay further proceedings in this action until the Kansas Supreme Court addressed the constitutional challenges to *Cox* and *Smith* raised in *Armstrong*.

In *Armstrong*, decided on December 11, 1987, the Kansas Supreme Court rejected the plaintiff's claims that application of *Cox* and *Smith* violated her constitutional rights. *Id.* 747 P.2d at 123-25. The court reiterated its previous holding that while a tort action for retaliatory discharge was available to employees-at-will, it was not available to employees covered by collective bargaining agreements. *Id.* 747 P.2d at 122. On the basis of the *Armstrong* decision, Southwest filed a motion to dissolve the stay of these proceedings, which we granted on January 22, 1988. That same day, the Kansas Supreme Court denied a motion for rehearing in *Armstrong*. On February 22, 1988, we denied Sutton's petition for rehearing and rehearing en banc.

Thirty-two days later, the Kansas Supreme Court reversed the position it had taken in the *Cox*, *Smith*, and *Armstrong* decisions. On March 25, 1988, the Kansas court held in *Coleman v. Safeway Stores, Inc.* 242 Kan. 804, 752 P.2d 645, 646 (1988), that a tort action for retaliatory discharge is available to employees covered by collective bargaining agreements. Based upon the change in Kansas law announced in *Coleman*, Sutton filed a motion to recall the mandate and reinstate the appeal. We granted that motion.

The primary issue before us now is whether to apply Coleman retroactively in this appeal. In addition, Southwest raises issues concerning the conduct of the trial and the type and amount of damages awarded.

II.

As a court sitting in diversity, we must apply a state supreme court's most recent statement of state law. *Robinson v. Volkswagen of America, Inc.*, 803 F.2d 572, 574 (10th Cir. 1986). *Coleman* is the most recent statement by the Kansas Supreme Court concerning that state's law on the existence of a tort action for retaliatory discharge. Our task therefore is to predict whether the Kansas Supreme Court would apply *Coleman* retroactively. *See Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1574 (10th Cir. 1984).

The Kansas Supreme Court provided no obvious indication in *Coleman* whether it intended that decision to be applied retroactively. Because *Coleman* does not expressly require retroactive application beyond that case, we must examine Kansas law for further guidance. The leading Kansas decision holds that retroactive application of an overruling decision is neither required nor prohibited as a matter of constitutional law. *Vaughn v. Murray*, 214 Kan. 456, 6521 P.2d 262, 269 (1974). In *Vaughn*, the Kansas Supreme Court cited with approval certain factors used by courts in determining whether to apply such a decision retroactively. These factors include: "(1) Justifiable reliance on the earlier law; (2) The nature and purpose of the overruling decision; (3) *Res judicata;* (4) Vested rights, if any, which may have accrued by reason of the earlier law; and (5) The effect retroactive application may have on the administration of justice in the courts." *Id.*

Applying these factors to the present appeal, we conclude that none of them preclude a retroactive application of *Coleman*. Southwest argues that a tort action for retaliatory discharge did not become available to employees subject to a collective bargaining agreement until the date of the *Coleman* decision, and thus *Coleman* should be restricted to prospective application. Southwest essentially claims that it justifiably relied on the law existing at the time it discharged Sutton. We are not persuaded.

Southwest's argument presumes that a tort action for retaliatory discharge did not exist at the time of Sutton's discharge. We disagree with this presumption, because we read *Murphy's* discussion of the public policy rationale underlying such causes of action as sufficiently broad to have provided Southwest with notice of a potential claim when it discharged Sutton over a year after *Murphy* was decided. Our view is supported by *Coleman's* reliance on the public policy rationale set forth in *Murphy*. In finding that this rationale should not be restricted to employees-at-will, the Kansas Supreme Court noted that "[a]lthough the employee in Murphy was an at-will employee, the primary emphasis of the opinion was on the strong public policy of Kansas underlying the Worker's Compensation Act, applicable to all workers injured on the job." *Coleman*, 752 P.2d at 649. Moreover, Southwest could not have relied on the holdings of *Cox, Smith, and Armstrong,* because these decisions were not announced until over one year after judgment was entered against it by the district court. Finally, the *Cox* line of decisions never sanctioned an employer's retaliatory discharge of an employee for filing worker's compensation clams. *Cf. Ebert v. Ebert,* 232 Kan. 502, 656 P.2d 766, 768 (1983) (Kansas decision overruling interspousal immunity doctrine only added possible civil liability in damages, and did not create criminal culpability for batteries committed upon a spouse, which were always unlawful).

Southwest also asserts that collective bargaining agreements have long provided covered employees with remedies protecting them from retaliatory discharge, and that these remedies adequately protected the public policy concerns identified by *Coleman* in cases pending at the time of *Coleman's* issuance. This argument ignores the Kansas Supreme Court's reasons for overruling its previous decisions in *Cox, Smith,* and *Armstrong.* The court found it a "disturbing proposition" that an employee subject to a collective bargaining agreement must surrender tort remedies which were not considered in the bargaining process or intended to be part of that agreement. *Coleman,* 752 P.2d at 651. The court also noted that denial of a cause of action for retaliatory discharge to employees subject to collective bargaining agreements in effect immunizes employers with such contracts

from "accountability for violations of state public policy." *Id.* The Kansas Supreme Court expressly recognized that the grievance and arbitration remedies afforded an employee under a union contract are inadequate when his discharge contravenes state public policies. *Id.* The court admitted that its *Cox* line of decisions had not considered such inadequacies, nor considered the emphasis in collective bargaining agreements upon the collective good rather than the individual employee's welfare. *Id.* 752 P.2d at 651-52.

Finally, we find significant the fact that the Kansas Supreme Court did not limit the cause of action announced in *Murphy* and *Coleman* to a prospective application. Plaintiffs Murphy and Coleman were allowed to assert their claims in remanded proceedings before the trial courts.

Nor does Southwest's argument comport with the court's purpose in overruling *Cox, Smith,* and *Armstrong* which was to erase the distinction made in those decisions between at-will and contractual employees discharged in violation of a state public policy. If we were to deny Sutton the benefit of that policy, we would perpetuate the same harms decried by the Kansas Supreme Court in *Coleman.*

Finally, turning to the third and fifth *Vaughn* factors, Southwest contends that a retroactive application of *Coleman* would contravene principles of res judicata and open the floodgates to relitigation of decisions based on *Cox.* However, Southwest's argument that a final decision has already issued in this appeal is flawed. Southwest ignores our order of May 10, 1988, which reinstated the appeal. In that order, we noted that Sutton's time to petition for certiorari had not elapsed so that a final judgment was not yet in effect. *See Linkletter v. Walker,* 381 U.S.618, 622 n. 5, 85 S.Ct. 1731, 1734 n. 5, 14 L.Ed.2d 601 (1965) (judgment not final until time for petition of certiorari has elapsed). Because a final judgment has not yet taken effect, our reconsideration of this appeal does not infringe upon res judicata principles. Similarly, the absence of a final judgment here also distinguishes this appeal from those cases relying upon *Cox, Smith,* and *Armstrong* in which a final judgment has issued.

Our application of *Coleman* in this appeal is warranted under the decisions in *Murphy, Coleman,* and *Vaughn.* We thus hold that Sutton has a claim for retaliatory discharge under Kansas law.

III.

Southwest raises a number of issues regarding the conduct of the trial. First, Southwest contests several evidentiary rulings. Under the Federal Rules of Civil Procedure and Federal Rules of Evidence, we may not overturn a jury verdict for an error in the admission or exclusion of evidence "unless a substantial right of the party is affected." Fed.R.Evid. 103(a); Fed.R.Civ.P. 61; *see also Beacham v. Lee-Norse,* 714 F.2d 1010, 1014 (10th Cir.1983). We have reviewed the entire record, and we are not persuaded that any of the contested evidentiary rulings affected Southwest's substantial rights.

Southwest also argues that the trial court failed to properly instruct the jury. We are unable to review this contention because Southwest failed to designate the instructions as part of the record. *See Neu v. Grant,* 548 F.2d 281, 286 (10th Cir. 1977) ("matters not appearing in the record will not be considered by the court of appeals."); *see also Sanabria v. International Longshoremen's Ass'n Local 1575,* 597 F.2d 312, 313 (1st Cir. 1974); *cf. United States v. Hart,* 729 F.2d 662 (10th Cir.1984). Finally, we view as frivolous Southwest's argument that there was insufficient evidence to create a jury issue on retaliatory discharge.

IV.

Southwest also fails to persuade us that the award of actual damages was excessive. Sutton's expert testified that his economic loss amounted to approximately $150,000. While Southwest presented contrary evidence, it was the jury's task to sort out the conflicts. Moreover, Kansas allows damages for emotional distress in the absence of physical injury "if such distress is caused by intentional or reckless outrageous conduct." *Lantz v. City of Lawrence,* 232 Kan. 492, 657 P.2d 539, 545 (1983). *See also Bowman v. Doherty,* 235 Kan. 870, 686 P.2d 112, 118-19 (1984). The district court held that Kansas would permit such

damages in an action establishing that an employee was discharged for exercising his rights under the Workmen's Compensation Act. We have no reason to disagree with that conclusion. Sutton presented ample evidence of the emotional distress caused by his termination, including the humiliation of being falsely accused of lying on his employment application and having to see his wife clean houses to support them when he could not obtain other employment. This facet of the damage award, which is difficult to quantify, undermines Southwest's argument that the award of $250,000 actual damages was excessive.

Southwest also challenges the jury's award of punitive damages. Its main argument proceeds from the same premise as its other arguments on retroactivity: that a cause of action for retaliatory discharge for employees subject to a collective bargaining agreement was not established until *Coleman*. Southwest points to *Murphy's* refusal to allow the employee-at-will there to claim punitive damages on a cause of action for retaliatory discharge just announced in that decision. *Murphy*, 630 P.2d at 193 ("[I]nasmuch as this is the first recognition of such a cause by a Kansas court of appellate jurisdiction, we believe the allowance of punitive damages in this case would be extremely unjust."). Southwest contends that *Coleman*'s extension of that same cause of action to contractual employees should likewise preclude an award of punitive damages in cases pending, or decided prior to, *Coleman*. We do not agree with this argument. *Murphy* provided Southwest with sufficient notice of the potential for an award of punitive damages well over a year before Sutton was discharged.

Southwest argues that the evidence in this case does not meet the requisites for an award of punitive damages. We recently addressed a similar issue under Kansas law in *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1446 (10th Cir.1987).

> "Punitive damages are imposed under Kansas law for 'a willful and wanton invasion of the injured party's rights, the purpose being to restrain and deter others from the commission of like wrongs.' [*Wooderson v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d

1038, 1061] (quoting *Cantrell v. Amarillo Hardware Co.*, 226 Kan. 681, 686, 602 P.2d 1326, 1331 (1979)).

> 'In assessing punitive damages the nature, extent, and enormity of the wrong, the intent of the party committing it, and all circumstances attending the transaction involved should be considered. Any mitigating circumstances which may bear upon any of the above factors may be considered to reduce such damages.' *Id.* (quoting *Henderson v. Hassur*, 225 Kan. 678, 594 P.2d 650, 663 (1979))."

Sutton presented evidence that Southwest was "grossly negligent or recklessly indifferent to the rights of others," *Wooderson*, 681 P.2d at 1062, when it fired him for falsifying his employment application notwithstanding Southwest's own records showing the application was not falsified. Sutton also presented evidence that Southwest continued to oppose his unemployment compensation claim and persisted in calling him a liar after learning that the accusation of lying on his employment application was false. Under these circumstances, we believe Sutton made out a claim for punitive damages under Kansas law.

Finally, Southwest claims that the punitive damages award of $1,000,000 is excessive. We also addressed this issue in *O'Gilvie*, where we noted that under Kansas law, " '[i]n fixing an award of punitive damages a jury may consider the amount of actual damages recovered, defendant's financial condition and probable litigation expenses.' " 821 F.2d at 1447 (quoting *Binyon v. Nesseth*, 231 Kan. 381, 646 P.2d 1043, 1047 (1982)). In *Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152, 1168 (10th Cir.1981), *cert. denied*, 464 U.S. 824, 104 S.Ct. 92, 78 L.Ed2d 99 (1983), we held that

> "absent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the damages is considered inviolate."

We have reviewed the record, and our judicial consciences are not shocked by the size of the award in this case.

The district court opinion is affirmed in all respects.

APPENDIX C

JUDGMENT ON JURY VERDICT

FOR THE
United States District Court * DISTRICT OF KANSAS

JOHN L. SUTTON

vs.

CIVIL ACTION
FILE NO. 83-2263

SOUTHWEST FOREST
INDUSTRIES,

This action came on for trial before the Court and a jury, Honorable DALE E. SAFFELS, United States District Judge, presiding. The issues having been duly tried and the jury having duly rendered its verdict, it is ordered and adjudged that the plaintiff John L. Sutton recover of the defendant Southwest Forest Industries the sum of $1,250,000.00 with interest thereon at the rate of 8.08% per annum as provided by law, and his costs of action.

Dated at KANSAS CITY, KANSAS, this 28th day of October, 1985

ARTHUR G. JOHNSON

Clerk of Court

/s/ Molly A. Riggs

Molly A. Riggs, Deputy Clerk

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN L. SUTTON

Plaintiff,

v.

SOUTHWEST FOREST INDUSTRIES,

Defendant.

CIVIL ACTION
No. 83-2263-S

MEMORANDUM AND ORDER

This matter is before the court on defendant's application to approach jurors, motion to alter or amend judgment, and motion for judgment notwithstanding the verdict or motion for new trial.

Defendant seeks to approach jurors because of its belief that the verdict in favor of plaintiff is clearly contrary to the weight of the evidence. Defendant further asserts that the size of the verdict indicates misconduct and improper considerations on the part of the jury.

Rule 23a of the Rules of Practice of the United States District Court for the District of Kansas requires attorneys to refrain from approaching jurors who have completed a case unless authorized by the court. Authorization shall be granted when just cause is shown. Interviews of jurors by persons connected with a case are not favored except in extreme situations. *Stein v. New York*, 346 U.S. 156, 178 (1953).

To approach jurors in this case, defendant must make a strong showing of just cause, which it has failed to do. It follows that defendant's application to approach jurors must be denied.

Next before the court is defendant's motion to alter or amend the judgment. In particular, defendant seeks remittitur. Defendant argues that both actual and punitive damages were excessive in this case. Where a verdict is excessive, that is, against the weight of the evidence, the court may order a remittitur and alternatively direct that there be a new trial if plaintiff refuses to accept it. *Homes v. Wack,* 464 F.2d 86 (10th Cir. 1972); Rule 59, Federal Rules of Civil Procedure.

Defendant argues for remittitur as to compensatory damages and states that the testimony of Dr. Morris that the economic loss of plaintiff between One Hundred Forty-Six Thousand Dollars ($146,000) and One Hundred Fifty Thousand Dollars ($150,000) was from a disability standpoint rather than from a termination standpoint. Defendant asserts that its evidence established that plaintiff had not been substantially harmed economically. Further, defendant argues that plaintiff's claims for embarrassment and humiliation were not proper damages in this cause of action and that the court's instructions did not provide proper guidance on the damage issue.

The court has reviewed the record and finds there was sufficient evidence to support the jury's award of compensatory damages. There is no showing that the award was excessive.

Defendant also objects to the jury's award of punitive damages and argues first that the size of the award was excessive, and second that the punitive damages issue should not have been submitted to the jury as this was not an appropriate case for the award of punitive damages. In the instant case, the court does not find the size of the punitive damages award to be shocking or excessive to merit reduction. Further, the court concludes that this was a proper case to be submitted to the jury on the issue of punitive damages. The Kansas Court of Appeals in *Murphy v. City of Topeka,* 6 Kan.App.2d 288, 630 P.2d 186 (1981), created an exception to the employee-at-will doctrine and allowed recovery for an employee who was discharged in retaliation for filing a workman's compensation claim. Defendant argues that the plaintiff in *Murphy* was an at-will employee, and since the plaintiff in the instant case was covered by a union contract, defendant was unaware that *Murphy* would

be extended to apply to an employee covered by a contract. The court is not persuaded by this argument. *Murphy* was filed on June 19, 1981, and put employers on notice that discharging an employee in retaliation for filing workmens' compensation claims is actionable and will support an award of actual and punitive damages. Plaintiff in this case was fired over one year after this decision, long enough for defendant to be on notice of the rule and public policy favored in *Murphy*. Based on the foregoing, defendant's motion to alter or amend the judgment is denied.

Next before the court is defendant's motion for judgment notwithstanding the verdict or motion for new trial. In considering a motion for judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the party against whom the motion is made. *Wilkins v. Hogan*, 425 F.2d 1022 (10th Cir. 1970); Rule 50(b), Federal Rules of Civil Procedure. A judgment notwithstanding the verdict may not be granted unless the evidence points one way and is susceptible to no reasonable inference which may sustain the position of the party against whom the motion is made. *Symons v. Mueller Co.*, 493 F.2d 972 (10th Cir. 1974). It is not the court's duty to weight the evidence [*Wilkin v. Sunbeam Corp.*, 377 F.2d 344 (10th Cir. 1967)], or to pass upon the credibility of witnesses [C. Wright and A. Miller, 9 *Federal Practice and Procedure* §2527], or to substitute its judgment of the facts for that of the jury [*Swearngin v. Sears Roebuck & Co.*, 376 F.2d 637 (10th Cir. 1967)].

The standard for granting a new trial is less rigorous than the standard for granting judgment notwithstanding the verdict. A decision to grant a new trial "involves an element of discretion which goes further than the mere sufficiency of the evidence. It embraces all the reasons which inhere in the integrity of the jury system itself." *Tidewater Oil Co. v. Waller*, 302 F.2d 638, 643 (10th Cir. 1962). A new trial is not in order unless the court finds that prejudicial error has entered the record or that substantial justice has not been done. *Seven Provinces Ins. Co., Ltd. v. Commerce & Industry Ins. Co.*, 65 F.R.D. 674 (W.D. Mo. 1975).

Defendant raises several points in its motion, the main ones being that the decision of *Murphy v. City of Topeka, supra,* does not extend to plaintiff because he is covered by a collective bargaining agreement, and further that this action is preempted by §301 of the National Labor Relations Act [hereinafter NLRA], 29 U.S.C. 151, *et seq.* The court heard oral argument regarding these matters on December 6, 1985.

The court has previously dealt with these matters and concludes that the *Murphy* decision is applicable here. *Murphy* established a tort cause of action, and the fact that plaintiff was covered by a contract in this case has no bearing. The strong indication of public policy contained within the opinion supports the proposition that all employees are to be afforded the protection espoused in *Murphy.*

Defendant cites the recent case of *Allis-Chalmers v. Lueck,* ___ U.S. ___, 53 U.S.L.W. 4463 (1985), in support of its argument that this action is pre-empted by the NLRA. The United States Supreme Court in *Allis-Chalmers* found that a state tort claim against an employer for bad faith handling of an insurance claim was pre-empted by federal labor laws. The court found the issue before it to involve federal contract interpretation along with whether the employer's actions constituted breach of contract. Included within the court's reasoning was the consideration that under state law the tort is intrinsically related to the nature and existence of the contract. Any attempt to assess liability would inevitably involve contract interpretation. The duties and the rights established through the state tort are therefore derived from the rights and obligations established by the contract. State law rights and obligations that do not exist independently of private agreements and which can be waived or altered by agreement of private parties are pre-empted by those agreements. The court held that

> . . . when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a §301 claim . . . or dismissed as pre-empted by federal labor-contract law . . . .

53 U.S.L.W. at 4468.

When reaching its decision, the court cautioned of the narrow focus of its conclusions. The court further stated:

> . . . Nor do we hold that every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by §301 . . . .

Id., 53 U.S.L.W. at 4468.

The court is aware of the cases following the *Allis-Chalmers* decision which have found that claims of retaliation for the filing of workmens' compensation claims filed by employee's covered under a collective bargaining agreement were pre-empted by §301 of the NLRA. *See Johnson v. Hussman Corp.*, 610 F.Supp. 757 (E.D. Mo. 1985); *Vantine v. Elkhart Brass Mfg. Co., Inc.*, 762 F.2d 511 (7th Cir. 1985); and *Lingle v. Norge Div. of Magic Chef*, 618 F.Supp. 1448 (S.D. Ill. 1985). However, the court respectfully declines to follow the holdings contained within these opinions.

A careful reading of the *Allis-Chalmers* decision indicates that it is inapplicable here. The case at bar involves the adjudication of a state tort which exists independent of any contractual relationship. Interpretation of the collective bargaining agreement is not involved when reaching a decision based on plaintiff's retaliatory discharge claim. The mere fact that the collective bargaining agreement contains a provision prohibiting discharge without just cause does not bring these facts within its gambit. The state has a proper concern about the enforceability of its workmen's compensation laws and the remedy pursued by plaintiff in no way conflicts with the collective bargaining agreement or the NLRA. There is no danger of interference with federally-protected activity. The court finds the decision of the Tenth Circuit Court of Appeals in *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981), which stands for the proposition that discharge for filing workmens' compensation claims is not subject to either protection or prohibition by the NLRA because it has nothing to do with union organization or collective bargaining, still to be controlling authority. Plaintiff's retaliatory discharge claim is in no way dependent upon the collective bargaining agreement. It follows that this action is in no way

pre-empted by the NLRA. Defendant's exhaustion argument likewise must fail.

Defendant also argues that the evidence does not support the finding that plaintiff was fired solely in retaliation for filing a workman's compensation claim. Further, defendant argues that the evidence established that plaintiff was not threatened or coerced by defendant either before or after his workman's compensation claim was filed. The jury in this case was properly instructed in Instruction No. 11 to consider the motivating reason for plaintiff's discharge. *See Peabody Galion v. Dollar, supra.* Further, a review of the record indicates that plaintiff submitted sufficient evidence to go to the jury in support of his claim.

Defendant also argues that plaintiff's counsel's repeated references to unemployment proceedings improperly caused the jury to infer that since plaintiff prevailed at the administrative level he likewise should prevail at trial. The court finds this argument to be without merit. The statements made by plaintiff's counsel were not prejudicial, and, in the event they could result in prejudice, the jury was properly instructed in Instruction No. 10 regarding the differing burdens of proof in the two proceedings.

Another contention of error raised by defendant concerns the withdrawal of Dr. Prostic's report by plaintiff. The court has reviewed the record and finds no error to have been committed on this point.

Defendant also argues that it was error to admit any evidence concerning the discharge case of McFadden, one of defendant's employees. The record reflects no error on this point.

Another objection defendant raises concerns a comment made by the court during the cross-examination of defendant's expert witness, Dr. Miller. The court finds no prejudice to have resulted thereby. Further, in Instruction No. 3, the jury was properly instructed regarding rulings, remarks and actions taken by the court during trial.

Defendant also argues that plaintiff's closing argument was improper as it interjected counsel's personal beliefs and opinions regarding the evidence. The court finds this argument to lack merit. Further, Instruction No. 19 specifies that remarks of counsel are not to be regarded as evidence in the case.

Defendant also argues Instruction No. 4 exceeded the scope of the pre-trial order, failed to properly state the elements of plaintiff's cause of action, did not correctly state the law, included an improper element of damages and failed to properly state defendant's claim. The court has reviewed the record and finds these arguments to be without merit. Instruction No. 4 set out the claims and defenses of the parties. The jury was properly instructed regarding these issues. Additionally, Instruction No. 5 instructed the jury that Instruction No. 4 sets forth the claims of the parties and is not to be considered as evidence in the case.

Defendant objects to the exclusion of Instruction No. 12 which was originally proposed by the court. The court finds no error on that basis.

IT IS BY THE COURT THEREFORE ORDERED that defendant's application to approach jurors is hereby denied.

IT IS FURTHER ORDERED that defendant's motion to alter or amend judgment is hereby denied.

IT IS FURTHER ORDERED that defendant's motion for judgment notwithstanding the verdict or motion for new trial is hereby denied.

DATED: This 2nd day of January, 1986, at Kansas City, Kansas.

DALE E. SAFFELS
United States District Judge

APPENDIX E

Court of Appeals of Kansas.
No. 51847

Harold MURPHY, Plaintiff-Appellant,
Cross-Appellee,

v.

CITY OF TOPEKA-SHAWNEE COUNTY
DEPARTMENT OF LABOR SERVICES;
Bill Bywater; Ann Newman; and
Alonzo Harrison, Defendants-
Appellees and Cross-Appellants,

v.

BOARD OF COUNTY COMMISSIONERS
OF SHAWNEE COUNTY, KANSAS, et
al, Third-Party Defendants-
Appellees and Cross-Appellants.

Syllabus by the Court

1. Absent express authority conveyed upon it by statute or ordinance, an administrative agency of a city does not possess the capacity to sue or to be sued without the joinder of the city as a "contingently necessary" party to the action.

2. Whenever a necessary and indispensable party to an action has not been joined in the action, and cannot for legal reasons be later joined, the action must be abated as to those parties.

3. An action brought by an employee-at-will against his employer and its supervisory personnel for retaliatory discharge sounds in tort, and the plaintiff may not characterize such an action as one in contract in order to avoid the provisions of K.S.A. 12-105, now repealed.

4. Individual officers and employees of an immune governmental entity do not share that immunity when they act outside

the scope of their authority or commit a willful or wanton act which results in injury to others.

5. In the absence of a contract, expressed or implied, between an employee and his employer covering the duration of employment, the employment is normally terminable at the will of either party.

6. The Workmen's Compensation Act provides efficient remedies and protection for employees, and sound public policy requires protection from coercion in the free exercise of their rights under the act which would substantially subvert the purpose of the act.

7. Under the facts and circumstances of this case, it is *held* that the discharge of an employee in retaliation for filing a workmen's compensation claim is actionable at law and may support an award of both actual and punitive damages.

Fred W. Phelps, Jr., of Fred W. Phelps, Chartered, Topeka, for plaintiff-appellant and cross-appellee.

Robert E. Duncan, II, Asst. City Atty., and Timothy E. Paul, Deputy City Atty., Topeka, for the defendant-appellees and cross-appellants city of Topeka-Shawnee County Dept. of Labor Services.

David D. Plinsky, of Dept. of Labor Services, Topeka, for defendants-appellees and cross-appellants Bill Bywater, Ann Newman and Alonzo Harrison.

Donna Voth, Asst. County Counselor, Topeka, for third-party defendants-appellees and cross-appellants Board of County Commissioners of Shawnee County, et al.

Before HERD Justice Presiding, SWINEHART, J., and WILLIAM M. COOK, District Judge, Assigned.

WILLIAM M. COOK, District Judge, Assigned:

This is an appeal by plaintiff, Harold Murphy, a terminated employee, from the district court's dismissal of his cause of action against defendants, City of Topeka-Shawnee County Department of Labor Services, Bill Bywater, Ann Newman, and Alonzo Harrison. Also involved is a cross-appeal by defendants and third-

party defendants Board of County Commissioners of Shawnee County, *et al.*, from a prior order of the trial court sanctioning a cause of action for wrongful retaliatory discharge from employment, heretofore unrecognized in this state.

Harold Murphy was employed by the Department of Labor Services (DOLS), an administrative agency of the City of Topeka. Murphy was employed in April, 1977, and allegedly sustained on-the-job injuries on June 15, 1977. Subsequent to his injury, Murphy filed a workmen's compensation claim as authorized by the Kansas Workmen's Compensation Act, K.S.A. 44-501 *et seq.* Murphy contends he was offered further employment by DOLS, through its supervisory employees, defendants Bywater, Newman and Harrison, on the condition that he withdraw his compensation claim. When Murphy refused, he claims his employment was terminated by defendants.

On January 31, 1979, Murphy filed his petition in the district court alleging he was discharged in retaliation for claiming workmen's compensation benefits against his employer, and prayed for both actual and punitive damages. Defendants filed an answer asserting the defense of governmental immunity, filed motions to dismiss and for summary judgment, and filed a third-party petition against the third-party defendants for judgment in the amount of any damage award for which defendants might subsequently be held liable under plaintiff's petition. On July 31, 1979, the trial court denied the original motion to dismiss, holding that plaintiff's petition stated a valid claim, *viz.*, retaliatory discharge for failure to withdraw his workman's compensation claim. The court held:

> "These laws [workmen's compensation] were a great social and economic step forward in this country and the Court is of the opinion that for an employer to intentionally and wrongfully fire a workman for filing a Workmen's Compensation Claim and proceeding thereon, *when said workman is able to perform his work,* is the basis for a claim in tort and is contrary to the public policy of this state. This is not to say that an employee who is injured on the job and who has a Workmen's Compensation Claim and is unable

to perform the work as a result of the injury cannot be discharged."

The trial court later, however, by letter decision dated December 12, 1979, dismissed plaintiff's cause of action against all defendants. The court found that plaintiff had failed to comply with the notice requirements of K.S.A. 12-105 and since that statute was applicable to any agency of a city, his action must, therefore, be dismissed. The court also held that the individual defendants were acting within the scope of their authority when they terminated the plaintiff and his action against them must likewise fail. Plaintiff claims the court erred.

While stated differently and in varying detail by the parties, there are two primary issues to be decided in this appeal and cross-appeal: (1) Did the district court err in dismissing plaintiff's lawsuit for failure to comply with K.S.A. 12-105; and (2) does a cause of action exist in this state for an employee-at-will who is terminated by his employer for filing a workmen's compensation claim? The second question is one of first impression for this state and involves important public policy considerations.

Pursuant to the Interlocal Cooperation Act (K.S.A. 12-2901 *et seq.*), the City of Topeka and Shawnee County entered into a contract denominated "Cooperative Agreement for the Administration of Employment and Training Services." The contract provided, in part as follows:

> "The Participating Governments agree to establish a single Comprehensive Manpower Program (hereinafter referred to as the Program), serving the Program Area. To establish this Comprehensive Program, the Participating Governments hereby agree that the County of Shawnee yields its power of attorney to the city of Topeka to apply for funding under the Comprehensive Employment and Training Act (CETA) and to establish the Topeka-Shawnee County Consortium. In doing this the County of Shawnee gives, delegates, and authorizes the City of Topeka to act on its behalf in all matters as they relate to the Consortium and CETA 1973 and its amendments except that the Consortium members reserve the right of evaluation

and the decision to reprogram funds. *Responsibility for program operations is vested with the City of Topeka Department of Labor Services* (DOLS) by the designation of the Participating Governments, the City of Topeka, as the Administrative Arm of the Consortium. *The consortium shall be the prime sponsor, the Department of Labor Services shall be the administrative unit designated to operate the program.*

. . . .

"It shall be the responsibility of the City of Topeka to establish and maintain a city governmental agency responsible for the direct administration and operation of the Program. *Said administrative unit shall be known as the City of Topeka Department of Labor Services* (DOLS).

. . . .

"All staff Personnel employed by the Administrative Arm shall be employees of the city." (Emphasis supplied.)

The City of Topeka, in compliance with the contract provisions, enacted Ordinance No. 13990 which established the Department of Labor Services (DOLS) to function as the "administrative unit" as authorized and defined under the Comprehensive Employment and Training Act of 1973 (CETA). Although DOLS, because of it county-wide jurisdiction, may be known locally under the name of "City of Topeka-Shawnee County Department of Labor Services," as designated by plaintiff in his petition and summons, the department is solely an agency of the City of Topeka.

Plaintiff concedes that he failed to file a written claim with the city clerk of Topeka. K.S.A. 12-105, since repealed, provided:

"No action shall be maintained by any person or corporation against any city on account of injury to person or property unless the person or corporation injured shall within six (6) months thereafter and prior to the bringing of the suit file with the city clerk a

> written statement, giving the time and place of the happening of the accident or injury received, the circumstances relating thereto and a demand for settlement and payment of damages . . . ."

Plaintiff argues K.S.A. 12-105 does not apply to the present situation. He contends the statute only applies to cities and his suit, brought only against DOLS and its individual employees, is not against a city. His contention, insofar as DOLS is concerned, is without merit.

Absent authority expressly given by statute or ordinance, an agency of a city does not have the capacity to sue or to be sued as a separate entity; the city is a necessary and indispensable party to any action filed either by or against the agency. *Hubert v. Board of Public Utilities,* 162 Kan. 205, 174 P.2d 1017 (1946); *Seely v. Board of Public Utilities,* 143 Kan. 965, 57 P.2d 471 (1936). K.S.A. 60-219 requires that any "contingently necessary" person must be joined as a party in any action and, when not joined, the district court shall order that he be made a party. In the present case the court could not order the joinder of the City of Topeka because of plaintiff's failure to comply with the notice requirements of K.S.A. 12-105. We find that the court did not err in dismissing plaintiff's action against DOLS.

The comprehensive manpower program was jointly sponsored by the City of Topeka and Shawnee County even though it was solely administered by the City. Plaintiff may have had a cause of action against the county inasmuch as DOLS was acting as the administrative agent of both governmental bodies. The notice provisions of K.S.A. 12-105 applied only to "cities" and would not have precluded an action against Shawnee County. K.S.A. 12-105a did not expand the notice requirements to other governmental units, as argued by the defendants. Plaintiff, however, did not join the county as a party defendant in his lawsuit, and such joinder is now precluded by the statute of limitations (K.S.A. 60-513).

Plaintiff would have us hold that his claim arises out of a breach of implied contract, rather than tort. K.S.A. 12-105 has application only to actions for *injury* to persons or property, *i.e.,*

tort actions and not to actions on contract. *Stauffer v. City of Topeka,* 200 Kan. 287, 436 P.2d 980 (1968).

The nature of a claim, whether it sounds in contract or tort, is determined from the pleadings. In *Malone v. University of Kansas Medical Center,* 220 Kan. 371, 374, 522 P.2d 855 (1976), the court said:

> "A breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement. A tort, on the other hand, is a violation of a duty imposed by law, a wrong independent of contract. Torts can, of course, be committed by parties to a contract. The question to be determined here is whether the actions or omissions complained of constitute a violation of duties imposed by law, or of duties arising by virtue of the alleged expressed agreement between the parties."

Plaintiff's petition asserts that he was intentionally and recklessly terminated for his employment in retaliation for filing a workmen's compensation claim. He does not claim the existence of a contract of employment covering the duration of employment. His termination did not breach any contractual obligations, either expressed or implied, presently recognized because as an employee-at-will his employment could be terminated at any time, with or without cause. If plaintiff has alleged a sufficient cause of action herein, as will be later discussed, it arises from a duty imposed by law based upon public policy preventing an employer from wrongfully discharging an employee in retaliation for filing a workmen's compensation claim. Plaintiff's action clearly sound in tort, and the mere existence of a contractual relationship between the parties does not change the nature of his action. In *Yeager v. National Cooperative Refinery Ass'n,* 205 Kan. 504, 509, 470 P.2d 797 (1970), the court quoted the rule from 52 Am.Jur., Torts § 26, p. 379:

" 'Where a contractual relationship exists between persons and at the same time a duty is imposed by or arises out of the circumstances surrounding or attending the transaction, the breach of the duty is a tort . . . .' "

This brings us to the individual defendants, Bywater, Newman and Harrison. They first assert that the notice requirements of K.S.A. 12-105 are also applicable to a tort action against individual officers and employees of a city. A similar assertion was rejected in *Bradford v. Mahan,* 219 Kan. 450, 453, 548 P.2d 1223 (1976), wherein the court held:

> "The notice requirements of K.S.A. 12-105 apply only to actions for injury to person or property against a municipality and are not a condition precedent to bringing an action against a police officer, even though said officer was engaged in the performance of a governmental function."

Even though *Bradford* involved an action against police officers as opposed to administrative officers in the instant case, we see no reason to draw a distinction between classes of city employees. K.S.A. 12-105 is clearly intended to apply only to a city and not to its individual officers and employees.

The individual defendants also argue that the doctrine of governmental immunity precludes plaintiff's cause of action. They contend that the City of Topeka is immune from suit for negligence and misconduct of its officers and employees while engaged in the performance of their duties and that they should share in that immunity. Defendants are correct in stating that individual officers and employees of an immune governmental entity share that immunity when acting within the scope of their employment. Such was the common law rule which has been incorporated into the Kansas Tort Claims Act (K.S.A. 1980 Supp. 75-6104). However, inasmuch as we have already held that plaintiff's action against both the City and its agency must fail because of the notice requirements of K.S.A. 12-105, it is not now necessary for us to determine whether the city of Topeka, along with DOLS, were afforded protection against plaintiff's cause of action under the theory of governmental immunity. Even assuming arguendo that such immunity did exist, that immunity would not extend to the individual defendants based upon the allegations of plaintiff's petition. The common law rule recognized an exception to the immunity of public officers:

> "The immunity of the sovereign from suit does not protect public officers from personal liability for their wrongful acts in excess of their official authority . . . .since the acts of officials which are not legally authorized or which exceed or abuse their authority or discretion are not acts of the state . . . ." 72 Am.Jur.2d States, Etc. § 115, p. 504.

This exception has been recognized in Kansas in cases holding that officers were not liable "in the absence of malice," *Kretchmar v. City of Atchison,* 133 Kan. 198, 204, 299 P.621 (1931); "in the absence of malice, oppression in office or willful misconduct," *Hicks v. Davis,* 100 Kan. 4, Syl., 163 P. 799 (1917); for acts unless "wholly outside their jurisdiction," *Evans v. Marsh,* 158 Kan. 43, 47, 145 P.2d 140 (1944); or "in the absence of malice, oppression, wantonness, or willful misconduct," *Commercial Union Ins. Co. v. City of Wichita,* 217 Kan. 44, Syl. ¶ 7, 536 P.2d 54 (1975).

It is not for this court to determine whether the individual defendants have been guilty of any of the exceptions noted above. Plaintiff has, however, alleged willful and wanton misconduct and the allegations of his petition, on a motion to dismiss, must be taken in the light most favorable to him. The question always for the trial court's determination is "whether in the light most favorable to plaintiff, and with every doubt resolved in his favor, the petition states any valid claim for relief. Dismissal is justified only when the allegations of the petition clearly demonstrate plaintiff does not have a claim." *Weil & Associates v. Urban Renewal Agency,* 206 Kan. 405, Syl.¶ 2, 479 P.2d 875 (1971). We find the trial court erred in dismissing plaintiff's action as to defendants Bywater, Newman and Harrison. Since these defendants are sued as individuals acting in abuse of their authority, the City is neither an indispensable nor proper party to plaintiff's action against them.

We now turn to the second issue: Does a valid cause of action exist? To so hold, we must find that the discharge of an employee-at-will in retaliation for filing a claim under the Workmen's Compensation Act is a cause for which an action in tort may lie in Kansas. Cross-appellants argue that few jurisdictions have

so held, in what they characterize as a "small band of renegade opinions."

It is settled law in Kansas "that in the absence of a contract, expressed or implied, between an employee and his employer covering the duration of employment, the employment is terminable at the will of either party." *Johnston v. Farmers Alliance Mutual Ins. Co.*, 218 Kan. 543, 546, 545 P.2d 312 (1976).

The Supreme Court of Indiana, in *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973), supplied the first judicial recognition that discharge of an employee in retaliation for filing a workmen's compensation claim is actionable at law and may support an award of both actual and punitive damages. Commenting on the case, Vol. 2A Larson's Workmen's Compensation Law, § 68.36, p. 68 (1980 Supp.), states:

> "It is odd that such a decision was so long in coming. Perhaps the explanation may lie in the fact that the conduct involved is so contemptible that a [sic] few modern employers would be willing to risk the opprobrium of being found in such a posture."

We would add that such instances may also be rare because employers have simply assumed such conduct was either illegal, actionable or both.

Cross-appellants adopt the Illinois Fourth District Court's argument in *Kelsay v. Motorola, Inc.*, 51 Ill.App.3d 1016, 9 Ill.Dec. 630, 366 N.E.2d 1141 (1977), which denied recognition to a cause of action for retaliatory discharge. As they note, however, the Illinois Supreme Court reversed that decision (74 Ill.2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353 [1978]), holding that the protection afforded by workmen's compensation laws was in furtherance of sound public policy, and an employee had a civil tort action against an employer who discharged her for filing a claim.

We believe the public policy argument has merit. The Workmen's Compensation Act provides efficient remedies and protection for employees, and is designed to promote the welfare of the people in this state. It is the exclusive remedy afforded the injured employee, regardless of the nature of the employer's negligence. To allow an employer to coerce employees in the free

exercise of their rights under the act would substantially subvert the purpose of the act.

We have given careful consideration to cross-appellants' argument that the Kansas legislature has twice considered amendments to the Workmen's Compensation Act which specifically would have allowed the type of action here affirmed and, by failure to adopt those amendments, it has clearly expressed its intention that such an action should not be recognized in this state. Cross-appellants' argument is two-pronged. First, it is argued that the failure to adopt the amendments (Senate Bill No. 153 in 1961 and House Bill No. 221 in 1963) is persuasive legislative history as to the legislature's intention. We disagree. While failure to enact may in some cases be a strong indication of legislative intent, it is not the most persuasive, as the legislature may positively declare that such actions shall not lie in this state. In the case of the two proposed amendments, we have before us no evidence of the legislature's reasoning in failing to adopt–no arguments, no committee hearing records, no statements of proponents or opponents. Both proposed amendments were lengthy compilations, going considerably farther than simply allowing the cause of action here considered. The proposals may well have failed for reasons altogether apart from the asserted cause of action. Simple evidence of legislative inaction rather than action cannot defeat the public policy considerations we find here controlling.

The second prong of the legislative inaction argument by cross-appellants attacks the district court's jurisdiction in this matter. K.S.A. 1980 Supp. 20-301 grants the district court jurisdiction over "all matters, both civil and criminal, unless otherwise provided by law . . . ." Cross-appellants argue that by its consideration of the above-mentioned amendments, and its failure to adopt the same, the legislature has "taken specific and direct action by declining to enact the statutory cause of action," and has thus "otherwise provided by law" deprived the district court of jurisdiction. This argument, however, turns the plain meaning of the statutory language completely around. For the legislature to fail to act on a matter is clearly not the same as for it to take positive action to exclude jurisdiction.

For the reasons stated herein, we find that plaintiff has alleged a valid cause of action for retaliatory discharge and his petition as to the defendants Bywater, Newman and Harrison should not have been dismissed by the district court. However, inasmuch as this is the first recognition to such a cause by a Kansas court of appellate jurisdiction, we believe the allowance of punitive damages in this case would be extremely unjust. One of the primary purposes for the imposition of punitive damages is to deter like wrongs from being committed in the future. Until the present pronouncement, it was not clearly known to defendants, or any other employer in this state, that a retaliatory discharge would give rise to an action for damages. Therefore, defendants' conduct in the present case does not justify the imposition of punitive damages.

We reverse and remand for action consistent with this opinion, with the proviso that, in the event plaintiff prevails in his claim against the individual defendants, no punitive damages be awarded. Punitive damages may, however, be awarded in any appropriate case that arises subsequent to this opinion.

APPENDIX F

IN THE EIGHTEENTH JUDICIAL DISTRICT DISTRICT COURT OF SEDGWICK COUNTY, KANSAS DOMESTIC DEPARTMENT

RUSTY COLEMAN

Plaintiff

vs. Case No. 85 C 2021

SAFEWAY STORES, INC.

Defendant

PARTIAL TRANSCRIPT OF PROCEEDINGS

MOTION IN LIMINE

BEFORE THE HONORABLE WILLIAM RUSTIN

January 11, 1989

APPEARANCES:

For the Plaintiff:

Mr. Trip Shawver
Attorney at Law
634 N. Broadway
Wichita, Kansas

For the Defendant:

Mr. Darrell Kellogg
Mr. Lawrence Gurney
200 West Douglas
Wichita, Kansas

(The following is a partial transcript of proceedings which occurred on the 11th day of January, 1989, before the Honorable William Rustin, in the presence of Mr. Darrell Kellogg, Mr. Lawrence Gurney, and Mr. Trip Shawver, and the Plaintiff was present in person.)

THE COURT: This is to consider the motion in limine filed by the defendant pertaining to punitive damages. I have a motion in limine that was handed me this morning by Mr. Gurney. And a brief in response to the motion in limine in regard to punitive damages. Mr. Gurney, it's your motion. You may proceed.

MR. GURNEY: Thank you, Your Honor. This is our motion, Your Honor, in limine, asking the Court to exclude from the issues in this matter any evidence, comments, argument in any way relating to punitive damages. And our motion is two-fold.

One, it talks about limiting it until a certain part in trial. The other part of it argues that punitive damages shouldn't be considered at all.

I want to take those kind of in reverse order, and I want to talk about whether or not punitive damages should be allowed in this case at all.

As the Court is well aware, punitive damages are designed to punish, to deter conduct, to make sure that the defendant pays for a grievous wrong. And they are only allowed in cases of malice, willful conduct, intentional conduct, reckless conduct, gross negligence, a grievous kind of conduct that might justify an award of punitive damages.

In this case, we believe that the Court should not allow punitive damages for several reasons. The most important of which is that in essence, this is a case of first impression. Safeway enacted, pursuant to the collective bargaining agreement in its own policies and regulations, an attendance program. And that attendance program, to anyway, to anyone's thinking or belief, was valid and binding, was not arbitrary, and it certainly violated nobody's rights.

In fact, when the matter was considered by Judge Klein of this District Court, Judge Klein stated, and I will just quote from his comment, that the ruling on our motion for summary judgment, "the Court has examined the briefs and finds or concludes," I think really he was making a conclusion of law there, "that the policy of the company requiring call-in was not arbitrarily or capriciously imposed on the plaintiff, even though her absence from work was due to a work-related injury," work-

related injury in this case was a cyst on the wrist and nature of that injury was such that it was a reasonable requirement that the plaintiff call in times required by the company and the company policy set forth in Exhibit A the defendant's statement of uncontroverted facts.

What the Court was saying, I believe, is that the call-in policy itself is fine. It's not arbitrary. It's not unreasonable to require an employer in this particular situation to require a call in, because they have an assembly line process. And they need people at each station before they start their shift. And need to know when there will be an anticipated absence.

And the Court validated that policy. The Supreme Court, when they took a look at this case, said one very limited thing with regard to call in policy. The Supreme Court of Kansas in its consideration of this case said that you can't use the call-in policy to require a call-in for a work-related injury.

Again, the Supreme Court did not say that the call-in policy itself is arbitrary or capricious or unreasonable. All the Court said was you can't use that policy to violate what we believe to be public policy of the State of Kansas, and that is work-related injury and absence related to it. They didn't change Judge Klein's ruling except to the extent that they modified it, saying that you can't use your call-in policy if there's work-related absence.

It was not until the Kansas Supreme Court said that you can't use this call-in policy and charge infractions for it that this employer or any other employer in the State of Kansas or elsewhere, had any idea that a reasonable valid call-in policy would not be allowed by the Court.

And it was not until the Court issued its opinion here in 1988 that this conduct was even wrongful. And this is the first time that the Court has suggested that a call-in policy even related to a work-related injury was against public policy.

When the Court of Appeals considered a similar situation in *Murphy vs. City of Topeka,* and they had before it a case of first impression, they concluded that since this was the first retaliatory discharge case, and since other employers wouldn't

have known that their conduct was wrongful, prior to its announcement of the decision, they felt like in justice and in equity, and in good conscience, they couldn't then punish that particular employer for conduct that it didn't know was wrongful at the time. And they said that you can go back and try this case and claim compensatory damages, but you can't claim punitive damages. For any employer who does it after the fact, who does it with knowledge of the rules, then punitive damages would be allowed.

I think this is the exact same kind of case you have here, Your Honor. You have got a case where the employer was handling the call-in policy, that it had no reason to believe was wrong. It certainly wasn't against the announcement in *Murphy vs. City of Topeka.* It was not until the Supreme Court said what they said that a part of their policy was wrong. And therefore, I don't think just equity and good conscience, this Court can ther punish this defendant for doing what it didn't know was wrongful.

Secondly, as we noted in our brief, there is some debate, and there is a Supreme Court case that cert. has been granted in, United States Supreme Court case that will deal with the issue of constitutionality of punitive damages at all. In tort kinds of cases.

The Court, some courts have stricken punitive damages and contact like that based upon cruel and unusual punishment which, based upon due process of law argument and so on, we have cited to the Court, both the United States constitutional provision out of Bill of Rights that deal with those and also the Kansas constitutional Bill of Rights that deal with those particular issues. Cruel and unusual punishment, due process of law, we cited those in our brief.

We would urge the Court to find and conclude that punitive damages and punishing a corporation is unconstitutional in a case of this nature.

Finally, well, not finally, another argument we note in our brief, that we attached an opinion to is an extremely recent California Supreme Court case. It's the case of *Foley vs.*

Interactive Data Corp. It doesn't have a Pacific 2nd cite yet, so we just attached a copy of Westlaw opinion. The case was decided December 29, 1988. That case technically deals with a different cause of action.

In California they recognize a tort for the implied covenant of good faith and fair dealing. And poses an obligation on all employers to act in good faith with any employee. What the Court said is instructive, I think. The Court, at page 53 of 131 in the Westlaw reporting system, said as we have reiterated, "the employment relationship is fundamentally contractual. Several factors combine to persuade us in the absence of legislative direction to the contrary, contractual remedies should remain the sole available relief for breaches of the implied covenant of good faith and fair dealing in the employment context."

The Court goes on to say it is against public policy to do anything other than that. By analogy, we would argue that this Court should maintain contractual remedies, and obviously, contractual remedies do not include punitive damages.

Finally, at close of plaintiff's case, we are going to be contending that K.S.A. 60-3701 is applicable to this case. And again, it's kind of based on the idea that no one knew that this kind of a claim would be allowed until the Kansas Supreme Court grabbed hold of it, reversed *Cox, Smith,* and *Armstrong,* and said that Miss Coleman does have a cause of action. Prior to that time, and certainly while *Cox, Smith,* and *Armstrong* were good law, plaintiff didn't even have a case. It was not until those cases were reversed that she's even allowed to come into court and present the argument that she will present to this jury.

The Supreme Court decision obviously came down after the effective date of the new statute that says that punitive damages have to be demonstrated by clear and convincing proof. That the jury is only asked if punitive damages should be awarded and then the Court assesses those damages.

We would argue that, and also argue at close of plaintiff's case to the extent that punitive damages are even an issue, assuming the Court would overrule this motion which obviously we contend it should not. That statute applies.

In the alternative, I would submit to the Court that if the Court were to allow punitive damages in this case, it certainly should not allow comments or argument on punitive damages until the plaintiff has established through a prima facie case an entitlement to damages. Comments about punishing the defendant. Punitive damages, deterring conduct are inflammatory by their very nature.

And we would submit that the plaintiff, to the extent the Court even allows, should preclude voir dire, opening statements, and comments on evidence from making any suggestions that punitive damages are an issue in this matter until he comes forward with some evidence that would suggest malice, ill will, spite, reckless conduct, gross negligence, a complete disregard for rights, some evidence that would justify punitive damages even under traditional tort rules.

For those reasons, we would ask the Court strike claim for any claim for punitive damages in this matter or in the alternative, limit evidence on the point.

THE COURT: Thank you.

MR. SHAWVER: First, let me raise the issue, Your Honor, that K.S.A. 60-3701 is unconstitutional. A similar statute that was enacted for the doctors was declared unconstitutional by the Supreme Court. I don't have the cite for that. The annotation for that can be found in Gardner's on their civil procedure. Gardner's Civil Procedure. They make that note in that regard as far as their real concerns whether or not K.S.A. 600-3701 is even constitutional.

I think we need to go back and look at the history of this type of case to decide whether or not punitive damages can be considered in this case. It's our position that they can.

First, the Supreme Court, when it sent the case back to us for trial and instructed us about the no-call provisions and instructed us about the absences, didn't say this is a case of first impression for employers in the state, and therefore, you can't assess punitive damages. Why would they do that?

Well, perhaps it could be what was shown to the Supreme Court at the time of oral argument. At the time of oral argument, it was intended to the Court that it was interesting that since *Murphy,* there were no non-union employers that had gotten zapped by the issue or the tort in *Murphy.* No cases had been taken up to the Supreme Court arguing the issues of *Murphy* and whether or not punitive damages should be awarded in retaliatory discharge cases or whether or not there was a retaliatory or wrongful discharge tort for firing someone as a result of worker compensation case.

I made that comment to the justices, that it was interesting to note that. What was very interesting to note was that after *Murphy,* the only cases that appeared in front of the Supreme Court were some employers that were trying to find a loophole, trying to find some niche to get away from *Murphy,* to be able to do exactly what *Murphy* said they shouldn't do. But do it anyway. Without any retribution by the Court.

Cox, Smith, Armstrong, all those were cases. And what they decided was, well, hey, we may have found a loophole or way around *Murphy* so that we don't have to pay money to these employees. We can fire them for filing a worker compensation case, and the most that can be given that employee, the most that employee will ever get from the employer is return to work and back wages. And that maybe after a considerable period of time off.

Now that was punctuated by this own defendant. When their own defendant put before the Supreme Court in a supplemental brief, or supplement to the record, a grievance filed by Donna Barnes. That was arbitrated and Safeway was told by the arbitrator that you can't fire someone for being off on a work injury. And she was returned to work if she was capable of going back to work. But the Justices could see the timeframe that it took Donna Barnes to finally get some sort of relief.

The Court could also see that Safeway was still doing the same thing. That since *Coleman,* back in 1984, that they were still doing the same thing shortly before our appeal. All this was before the Supreme Court. When they made the decision that they did, and they didn't limit this Court as far as punitive

damages, as far as saying this is a case of first impression, *Cox* and *Smith* and *Armstrong vs. Goldblatt,* didn't say that punitive damages weren't awardable. They didn't say it wasn't a tort. They didn't say that it wasn't wrong, and that you shouldn't do it.

They just said that you have got a contractual remedy as far as grievance and arbitration. That is sufficient to take care of your needs. And so we are going to let that procedure handle it rather than our court procedure.

But *Murphy* was also on the books. *Murphy* was always the law since 1981. And *Murphy* always said if you do it after *Murphy,* you are subject to retaliatory discharge or wrong of discharge. You are subject to punitive damages.

Now the defendants are wanting to say, well, now, we thought we had a loophole. We thought that *Murphy* we realized we were inviting public policy, but we thought that we couldn't be hit with punitive damages. They can't say they didn't realize that it wasn't wrong. They just said we didn't realize that we could be stuck in court with it. And what Justice Prager said to Mr. Smith in his oral argument, when we were talking about who had rights as far as grievance and arbitration and things.

MR. GURNEY: Your Honor, I think this is improper argument to assassinate Steve Smith who certainly is not here to defend himself, and I certainly wasn't there. I think the comments are contained in the argument at the Supreme Court level to the extent they're not public record or improper argument before this Court.

THE COURT: I tend to agree with that. Sustain the objection.

MR. SHAWVER: Okay. The record was before the Court. And the case came down and didn't limit *Murphy* at all. As far as punitive damages are concerned.

About the same time, *Palmer vs. Brown* was decided. And that's also in 242 Kansas, and that's at page 893. Same volume. Same timeframe as Coleman. That's the whistle-blowing case. It's not attached to my brief. But that also reaffirmed *Murphy.* And did not place any restrictions on punitive damages. There's

no language in there saying, well, now, we are recognizing whistle-blowing as a valid cause of action, but we are going to give all employers a first bite on this one.

Murphy was the only case that said Shawnee County gets one free bite but everybody else after that since this is public policy, is subject to punitive damages.

I know this Court has the power to say in this case Safeway gets one free bite. That's not what was said by the lower courts in *Murphy*. That was something that the Justices in the Supreme Court decided under the facts that they were entitled to one free bite. And I would hope that this Court, since *Murphy*, was the one that decided that, since the Supreme Court was the one that decided that *Murphy*, that if that's to be the law, then Safeway has one free bite, the Supreme Court decided it, if that's where it's going to come from. Rather than take us out of this case. Because when we filed this case, *Murphy* was the law. When we came up for trial on this case, *Murphy* was the law.

These defendants can't say that they thought *Murphy* wasn't the law. And they were relying on *Cox*, *Smith*, and *Armstrong* to protect them. Because as counsel indicated earlier, *Cox* and *Smith* and *Armstrong* were decided after the decision on summary judgment. So when we came up for trial, and when we were ready to proceed then, and we ended up with summary judgment granted against us, *Cox*, *Smith*, and *Armstrong vs. Goldblatt* had not been decided. So what's their reliance on those? How could they have in any way relied on those decisions to say we are not subject to punitive damages.

I give you the date and citations in my cases as far as the years that those were decided. The fact it wasn't even argued at first case, and I am not sure that it may be an issue in the pre-trial conference, but I'm not sure.

A comment briefly on the *Foley* case. It's difficult to read that slip opinion out of California as far as the defendant's brief is concerned. Defendant's motion is concerned. But it appears in looking at it that the Court of Appeals affirmed on the grounds that the plaintiff alleged no statutory-based breach of public policy sufficient to state a cause of action pursuant to –

THE COURT: Where are you quoting from?

MR. SHAWVER: I'm looking at the first page of the decision in about a quarter of the page down. Starts out, "The Court of Appeals affirmed."

THE COURT: All right, thank you.

MR. SHAWVER: It looks, therefore, that this case took off on the tangent that this wasn't a tort for a violation of public policy. There were no facts or sufficient grounds stated to go under that theory. And that they're going under the breach of covenant to discharge for good cause – pardon me. They also barred the good cause because of statute of fraud. Basically what they're talking about is a contract action. And in most contract actions, you don't have availability of punitive damages. So we don't think this is applicable to our case at all.

After the *Palmer* case which I cited to you previously, there was an occasion for a case to be tried in the Eighteenth Judicial District after *Palmer*. Though the plaintiff did not prevail, it's my understanding the issue of punitive damages was submitted to the jury without limiting voir dire, without limitation, and without subjecting it to K.S.A. 60-3701. And that is the case of John Haraburda. It's 86C1468.

In that case, the issue of punitive damages was submitted to the jury by Judge Royce. And that was a retaliatory discharge case. It was a whistle-blowing case, Your Honor, which is dissimilar to this, but like I say, *Palmer* and *Coleman vs. Safeway* both came down in the same advance sheet. And both of them said that employees have retaliatory discharge claims. And both of those cases cited *Murphy*.

It could be that counsel for the other side didn't raise all of these issues that are being raised today. But irrespective of that, Judge Royce submitted the matter to the jury on the issue of punitive damages.

For all those reason, we think that the issue of punitive damages is before the, should be before the jury. I want to be able to argue in voir dire, ask in voir dire, I want to be able to talk in opening argument about punitive damages. Because

I don't want a juror on this panel who, for some reason, can not or would not or will never award punitive damages in any case.

If we can't get down to final argument in the close of the case, and the Court finally deciding that punitive damages are an issue. And then I find that I have got a juror that under no circumstances could award any punitive damages.

THE COURT: Thank you.

MR. GURNEY: Can I respond very briefly?

THE COURT: Yes.

MR. GURNEY: The case that plaintiff's counsel cites, *Haraburda vs. Farmers and Merchants State Bank of Derby,* I don't know anything about. I certainly don't know whether the defendant in that case raised whether or not punitive damages should be allowed. And we certainly can not tell from this Court's record when the Court, Judge Royce particularly, allowed comments on punitive damages. Therefore, I don't think this supports his proposition in any respect, and there is no written opinion in here by Judge Royce.

Plaintiff's major argument in this case is a non sequitur. He says that what the Supreme Court of Kansas didn't, what counsel would suggest to this Court is that that which the Kansas Supreme Court did not say, somehow limits this Court. That's not the rules of law of the case or any other doctrine that I am familiar with.

The Kansas Supreme Court didn't instruct this Court one way or another about damages, but it did change the rules of the game to the employer, and for every other employer in the state. Prior to *Coleman vs. Safeway* being announced by Kansas Supreme Court, nobody in this state knew that a valid call-in policy shouldn't be applied. And you couldn't require an employee to call in even though they're off on work-related injury.

It's not until then, four years after the termination this defendant had any suggestion that it's counting infractions in any respect might be improper. And it would be improper now to punish them for it.

THE COURT: Thank you. I would like to make a couple of comments. Number one, I did allow oral motions to be filed yesterday by Mr. Kellogg concerning punitive damages. And I think basically in considering the lateness of the motion, basically, I did agree to this, because of the question of punitive damages. Both attorneys did present to me this morning that the evidence was given to me – excuse me. I'm sorry. The motions in limine and briefs that were given to me this morning.

I have had time to study them the best I can. I have read the *Murphy* case again, and I think basically speaking, it's pretty, it's interesting from what *Murphy* said, to what the opinion in the *Coleman* case is. In reading *Murphy,* I think there is a situation where this is, syllabus five states, "in absence of a contract, express or implied, between the employee and employer, covering duration of employment, the employment is normally terminable at the will of either party."

There's some more in the case, both parties know. Stating that this was an at will case. It did concern at will employees, basically speaking. Then we read the *Coleman* case and *Coleman* case did bring about a case from the Supreme Court saying that retaliatory discharge, wrongful discharge was in place with an employee who did have a contract also.

And I believe yesterday when I was stating my impression of the case, this brought about in essence a cause of action by contract employees that they did not have prior to filing of the opinion in the *Coleman* case. And I believe that in my opinion still is what occurred in this particular case.

What has been sent down by the Supreme Court on a retrial is the overruling of certain cases. And allowing the wrongful discharge, retaliatory discharge case involving contract employees. It was my understanding this did not exist prior to the time of *Coleman* case. I don't think this Court is limited in its damages either.

I do feel very similar to what was felt in *Murphy* that this case being a case of first impression, that the Court will not allow the question of punitive damages to be entered into this case. And I will follow the logic and the reasoning that is in

Murphy, the *Murphy* case. 6 Kansas Appellate, 488, in saying that I really do believe in this case, a case of first impression coming down from the Supreme Court, concerning contract employees, and their rights, that it would be unjust and unfair to the defendant to be subject to punitive damages. That will be the order of the Court.

(End of this portion of proceedings)

Supreme Court, U.S.
FILED
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CLERK

No. 89-1165

In The

Supreme Court of the United States

October Term 1989

SOUTHWEST FOREST INDUSTRIES, INC.,

Petitioner,

v.

JOHN L. SUTTON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit, sitting as a diversity court, properly applied an intervening decision of the Kansas Supreme Court in upholding a 1985 jury verdict against Petitioner Southwest Forest Industries for its retaliatory discharge of Respondent John L. Sutton in 1982, a year after the tort cause of action was created.

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STATEMENT

On July 9, 1982, petitioner Southwest Forest Industries, Inc. ("Southwest") fired respondent John L. Sutton ("Sutton"), in retaliation for filing a workers' compensation claim. Sutton was one of a number of injured employees drawing workers' compensation. Managers at the Southwest plant in Kansas City, Kansas, identified Sutton and others as malingerers who were targeted for review of their employment applications for alleged inaccuracies. (Tr. Vol. III, pp. 43-45, 48). After fabricating these alleged inaccuracies, Southwest fired Sutton. (Tr. Vol. III, pp. 49-66, 81) Sutton brought suit on June 17, 1983, relying upon the tort of retaliatory discharge created by the Kansas Court of Appeals in *Murphy v. City of Topeka*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981). That decision issued on June 19, 1981.

The *Murphy* court noted the tort first was recognized in *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973). It further noted it was odd that such a decision was so long in coming and that most "employers have simply assumed such conduct was either illegal, actionable or both." *Id.* at 192. In creating this cause of action, the Kansas court observed that it "clearly sounds in tort, and the mere existence of a contractual relationship between the parties does not change the nature of [Murphy's] action." *Id.* at 190. The court in *Murphy*, however, declined to allow the imposition of punitive damages in that case because there had been no previous recognition "that a retaliatory discharge would give rise to an action for damages." *Id.* at 193. The court warned, however, that "[p]unitive damages may, however, be

awarded in any appropriate case that arises subsequent to this opinion." *Id.*

Sutton filed his retaliatory discharge lawsuit in state court. Southwest removed it to the United States District Court for the District of Kansas. In the district court, Southwest contended that federal law barred a state law cause of action for retaliatory discharge because of the existence of a collective bargaining agreement, contending such claims were preempted pursuant to § 301 of the National Labor Relations Act, 29 U.S.C. § 185(a). The district court, relying upon *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981), held that a discharge for filing workers' compensation claims was not dependent upon the collective bargaining agreement and not preempted. *Sutton v. Southwest Forest Industries, Inc.*, 643 F. Supp. 662, 666 (D. Kan. 1986). *Peabody Galion* was decided December 11, 1981.

After Southwest took the instant appeal in January of 1986, the Kansas Supreme Court held in *Cox v. United Technologies, Inc.*, 240 Kan. 95, 727 P.2d 456 (1986), that unionized employees could not assert the tort of retaliatory discharge because they had an avenue or remedy for relief through interpretation of a collective bargaining agreement's just cause provision. A companion case to *Cox* was *Smith v. United Technologies, Inc.*, 240 Kan. 562, 731 P.2d 871 (1987). Sutton promptly informed the Tenth Circuit of the *Cox* decision, which issued October 31, 1986, and that court summarily reversed the district court judgment in deference to the intervening decision of the state court.

Sutton timely filed a petition for rehearing with a suggestion for rehearing *en banc*, contending that the Kansas Supreme Court had unconstitutionally deprived Sutton of tort remedies created by state law, had violated his due process right of access to redress a discriminatory discharge in the courts and had violated Sutton's right to equal protection under the law by establishing irrational classifications of employees and employers. *See Logan v Zimmerman Brush Co.*, 455 U.S. 422, 432, 439 (1982) (right to redress discriminatory discharge under state law is a property right, deprivation of which violates the due process clause).

Sutton also contended that the *Cox* rationale improperly required federal common law and arbitral authority to incorporate state public policy concerns in the interpretation of a federal contract's just cause provision. *See W. R. Grace & Co. v. Local 759*, 461 U.S. 257 (1983) (arbitral authority may not be restricted by public policy concerns inconsistent with the essence of the parties' agreement). Such an interpretation clearly would conflict with federal law and would be preempted under the same. Therefore, Sutton contended that federal law would preempt such a state rationale, a rationale that further appeared to be based on federal preemption and was an "obvious subterfuge to evade consideration of a federal issue". *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975) (*quoting Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945)).

While the foregoing constitutional and federal preemption issues were pending before the Tenth Circuit, the same legal issues were raised in *Armstrong v. Goldblatt Tool Co.*, 242 Kan. 164, 747 P.2d 119 (1987). Upon being informed of the pendency of the *Armstrong* case, the

Tenth Circuit granted a stay of Sutton's petition for rehearing to allow the Kansas Supreme Court to address the constitutional arguments made therein. In a sharply divided 4-3 opinion, that court rejected these constitutional arguments. The dissent, in an opinion by Justice Lockett, agreed that the court unconstitutionally had deprived unionized employees of due process and equal protection of the law.

The dissent compared contractual remedies with the much broader remedies of actual and punitive damages available under the tort. In addressing the need for punitive damages under the tort of retaliatory discharge, Justice Lockett noted the following:

> There is no authority under the agreement for the arbitrator to impose punitive damages. The majority, as did the court in *Cox*, has determined that the sole rationale for recognizing the tort of retaliatory discharge is to provide the employee with a remedy. *Murphy*, however, recognized that the tort was equally necessary as a deterrent to the employer to discourage the practice of retaliatory discharge. Punitive damages exist as an available sanction against an employer who violates an important public policy of the state. The majority decision immunizes employers of union employees from the imposition of punitive damages. Thus, the remedy provided by the collective bargaining agreement is far from full and complete.

Id. at 176-177.

After *Armstrong*, the Tenth Circuit denied the petition for rehearing with suggestions for rehearing *en banc*. Thirty-two days after this denial, the Kansas Supreme

Court, in a 6-1 majority opinion by Justice Lockett, overruled *Cox*, *Smith* and *Armstrong*, in *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 752 P.2d 645 (1988), holding that the public policy tort in *Murphy* applied to all employees and employers. *Id.* at 807. The court in *Coleman* observed that *Murphy* "took care to emphasize the tort nature of the employee's cause of action" despite the existence of any contractual relationship between the parties. The court further observed that "although the employee in *Murphy* was an at-will employee, the primary emphasis of the opinion was on the strong public policy of Kansas underlying the Workers' Compensation Act, applicable to all workers injured on the job." *Id.* at 809-10.

The *Coleman* court went on to find that the state tort action for retaliatory discharge conferred upon all employees and employers certain non-negotiable rights and duties that could not be part of a collective bargaining agreement or preempted by federal law. *Id.* at 812-13. *Coleman* said the *Cox* rationale had not fully considered the denial of a proper remedy to unionized employees and the fact that a union's emphasis is on the collective good, not with an individual employee's remedy for an employer's violation of state public policy. *Id.* at 814.

Upon learning of *Coleman*, Sutton, whose time to file a petition for writ of certiorari had not yet run, filed a motion to recall the mandate the day of the *Coleman* decision, March 25, 1988. The Tenth Circuit granted that motion and reinstated the appeal on May 10, 1988, in deference to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and *Huddleston v. Dwyer*, 322 U.S. 232 (1944). The mandate also was recalled by the Kansas Supreme Court in *Armstrong*, but that court subsequently determined

that it could not have recalled its mandate because of statutory restrictions on its jurisdiction. Contrary to the representation in Southwest's statement, the court did not deny damages to Armstrong; it simply determined it no longer had jurisdiction over the case and could not address the merits.

After the Tenth Circuit recalled its mandate, it called for supplemental briefing as to whether *Coleman* should be applied retroactively. The court employed state law guidelines on the applicability of an overruling decision to cases that were currently pending in the courts at the time of the decision. These guidelines are set out in *Vaughn v. Murray*, 214 Kan. 456, 521 P.2d 262, 269 (1974). The factors are "(1) justifiable reliance on the earlier law; (2) the nature and purpose of the overruling decision; (3) *res judicata*; (4) vested rights, if any, which may have accrued by reason of the earlier law; and (5) the effect retroactive application may have on the administration of justice in the courts." 868 F.2d at 354.

Southwest argued to the Tenth Circuit that *Murphy* never applied to it and, therefore, that the imposition of the tort's remedies was unfair. The Tenth Circuit rejected Southwest's argument:

> Southwest argues that a tort action for retaliatory discharge did not become available to employees subject to a collective bargaining agreement until the date of the *Coleman* decision, and thus *Coleman* should be restricted to prospective application. Southwest essentially claims that it justifiably relied on the law existing at the time it discharged Sutton. We are not persuaded.

> Southwest's argument presumes that a tort action for retaliatory discharge did not exist at the time of Sutton's discharge. We disagree with this presumption, because we read *Murphy's* discussion of the public policy rationale underlying such causes of action as sufficiently broad to have provided Southwest with notice of a potential claim when it discharged Sutton over a year after *Murphy* was decided. Our view is supported by *Coleman's* reliance on the public policy rationale set forth in *Murphy*. In finding that this rationale should not be restricted to employees at will, the Kansas Supreme Court noted that "[a]lthough the employee in *Murphy* was an at-will employee, the primary emphasis of the opinion was on the strong public policy of Kansas underlying The Workers' Compensation Act, applicable to all workers injured on the job." *Coleman*, 752 P.2d at 649. Moreover, Southwest could not have relied on the holdings of *Cox*, *Smith* and *Armstrong*, because these decisions were not announced until over one year after judgment was entered against it by the district court.
>
> Finally, the *Cox* line of decisions never sanctioned an employer's retaliatory discharge of an employee filing workers' compensation claims.

868 F.2d 354-355.

The court below also disposed of Southwest's argument that the collective bargaining agreements had long provided covered employees with remedies for retaliatory discharge, noting that *Coleman* found it a "disturbing proposition" that such employees must surrender tort remedies which were not considered in the bargaining process or intended to be part of the agreement. The Tenth Circuit said *Coleman* sought to eliminate the *Cox*

immunization of unionized employers from accountability for violations of state public policy. *Id.* at 355 (*citing Coleman*, 752 P.2d at 651).

Respondent notes that Southwest has effectively abandoned all positions relating to the propriety of the judgment as to the assessment of actual damages, instead, contesting only the imposition of punitive damages.

The Tenth Circuit also addressed Southwest's argument that *Murphy* somehow precluded an award of punitive damages:

> Southwest also challenges the jury's award of punitive damages. Its main argument proceeds from the same premise as its other arguments on retroactivity: that a cause of action for retaliatory discharge for employees subject to a collective bargaining agreement was not established until *Coleman*. Southwest points to *Murphy's* refusal to allow the employee-at-will there to claim punitive damages on a cause of action for retaliatory discharge just announced in that decision. *Murphy*, 630 P.2d at 193 ("[I]nasmuch as this is the first recognition of a cause by a Kansas Court of appellate jurisdiction, we believe the allowance of punitive damages in this case would be extremely unjust.") Southwest contends that *Coleman's* extension of that cause of action to contractual employees should likewise preclude an award of punitive damages in cases pending, or decided prior to, *Coleman*. We do not agree with this argument. *Murphy* provided Southwest with sufficient notice of the potential for an award of punitive damages well over a year before Sutton was discharged.

Id. at 356. Southwest's argument that there was not sufficient evidence of retaliatory conduct to submit to the jury was dismissed as "frivolous." *Id.*

Subsequent to the Tenth Circuit's judgment on February 10, 1989, defendant hired new appellate counsel and asserted in a petition for rehearing numerous factual and legal arguments, including constitutional claims, that had never been raised before. Southwest also informed the court below of the unpublished remarks of a state trial judge in the *Coleman* remand proceedings.[1] On October 26, 1989, the court denied Southwest's petition for rehearing *en banc*. Southwest filed the instant petition on January 24, 1990, and obtained a stay of the mandate pending resolution of the petition.

SUMMARY OF ARGUMENT

Southwest's Petition for Certiorari relies solely on the ground that the Tenth Circuit abused its discretion in a straightforward application of state law in a diversity case. That court properly applied an intervening and overruling decision of the Kansas Supreme Court in *Coleman* to the instant case. Southwest's contention that the Tenth Circuit failed to give deference to an intermediate appellate court decision, *Murphy*, simply is not supported by the record and the court's careful and thorough application of *Coleman* to *Murphy*. Southwest also contends that the lower court's analysis of *Coleman* failed to take

[1] Southwest does not inform the Court in its statement that *Coleman* was settled before trial on remand.

into account the remarks of the state trial judge on remand. The *Coleman* trial judge's oral ruling did not represent a rule of decision or controlling precedent to require a different outcome. Indeed, those remarks clearly were contrary to the high court's rationale and the Tenth Circuit was not bound by them. Southwest's acquiescence in the judgment's actual damages precludes its argument that punitive damages were not properly allowed for recovery on the same action. The court below did not abuse its discretion in the application of state law upholding the jury's punitive damage award.[2]

ARGUMENT

THE TENTH CIRCUIT DID NOT ABUSE ITS DISCRETION AS A DIVERSITY COURT IN DETERMINING THAT THE STATE'S HIGHEST COURT WOULD UPHOLD THE PUNITIVE DAMAGE AWARD AGAINST SOUTHWEST FOR ITS RETALIATORY DISCHARGE OF RESPONDENT.

Southwest's petition raises no special and important reason for granting a writ of certiorari. At best, Southwest simply disagrees with the lower court's relevant analysis of state precedent. Southwest does not contest the judgment's actual damages which depends on the lower court's resolution of state law; it only questions the propriety of the award of punitive damages. It does so by

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[2] This standard of appellate review is guided by this Court's reluctance to interfere with the jury's role in deference to the Seventh Amendment. *Browning-Ferris v. Kelco Disposal, Inc.*, ___ U.S. ___, 106 L.Ed.2d 219, 240-41 (1989).

a premise rejected by the district court and court of appeals, that a cause of action for retaliatory discharge did not exist for unionized employees until *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 752 P.2d 645 (1988), which recognized that *Murphy v. City of Topeka*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981), applied to all employees and employers.

Southwest does not complain about the size of the punitive award, or that it was the subject of passion or prejudice, merely that it disagrees with the lower court's discretionary interpretation of relevant and controlling state rules of decision. Southwest's argument is boiled down to two points. The first is that the language in *Murphy* represents a rule of law that punitive damages cannot be assessed when a tort action is first created; it interprets *Coleman* as a new cause of action, rather than an overruling of a subsequent immunity. Southwest's second point is that the Tenth Circuit failed to consider an unpublished trial court ruling. Respondent will address both of these concerns respectively.

A close review of *Murphy* and the most current interpretation of that decision by the Kansas Supreme Court in *Coleman*, is that a tort cause of action was created for all employees in 1981, putting all employers on notice, without exception, that such retaliatory conduct was actionable and would thereafter support an award of actual and punitive damages. While Southwest attempts to focus upon the at-will nature of the employee in *Murphy*, this fact is incidental to the tort duty imposed therein, despite any contractual relationship.

Additionally, Southwest puts undue emphasis on the *Murphy* court's restriction there on punitive damages because, until then, "it was not clearly known to defendants, or any other employer in this state, that a retaliatory discharge *would give rise to an action for damages.*" 630 P.2d at 193 (emphasis added). Southwest elevates the language "not clearly known" into a rule of law. It is not. *Murphy* emphasized the creation of an *action* for damages. The action existed when Southwest fired Sutton. Southwest admits it caused actual damages under this action by no longer contesting that aspect of the judgment. Southwest's assumption that it was shielded against punitive damages by *Murphy*, enjoys no reasonable interpretation of that case and is squarely contradicted by *Coleman*.

Southwest takes refuge in decisions subsequent to *Murphy*, but overruled by *Coleman*, that had suggested that *Murphy* applied only to at-will employees. Contrary to Southwest's assertion, the Tenth Circuit paid ultimate deference to state law when it initially reversed the judgment below, relying on *Cox*, and then reinstated the judgment when *Coleman* overruled *Cox*. If anything, the Tenth Circuit strictly adhered to the principles espoused in *Erie* and emphasized in *Huddleston v. Dwyer*, 322 U.S. 232 (1944), where this Court required the Tenth Circuit to reconsider its decision when a subsequent overruling decision of the state's highest court intervened after denial of a petition for rehearing but while the case was *sub judice*.

The applicability of *Murphy* cannot be disputed. The Kansas Supreme Court thoroughly disposed of the premise that *Murphy* did not apply to all employees when it

emphasized in *Coleman* the tort nature of the employee's cause of action. *Coleman* further emphasized that unionized employees did not surrender these tort rights and remedies by virtue of the collective bargaining process. Southwest's argument that *Murphy* represents a limitation of punitive damages herein is flatly contradicted by *Coleman*:

> Safeway contends that the public policy determined in *Murphy v. City of Topeka*, 6 Kan. App.2d 488, 630 P.2d 186 (1981), which allows employees to bring tort claims against their employers who discharge them for filing workers' compensation claims, was properly limited to at-will employees, while Coleman argues that the public policy underlying *Murphy* must apply to all employees. We believe that Coleman is correct.

Id. at 807. *Coleman* further established that the court erroneously assumed under the *Cox* rationale that it could require the arbitration of a tort matter. Under the Uniform Arbitration Act, K.S.A. § 5-401(c)(3) (1982), Kansas law prohibits "any provision of a contract providing for arbitration of a claim in tort." *Id.* at 809. Subsequent to *Coleman*, this Court held in *Lingle v. Norge Division of Magic Chef, Inc.*, ___ U.S. ___, 108 S. Ct. 1877 (1988), that collective bargaining agreements do not preempt state common law actions for retaliatory discharge under 29 U.S.C. § 185(a).

Further evidence of *Coleman's* intent that all employees under *Murphy* be allowed to assert an action for punitive damages, is the court's analysis of the deterrent function such damages serve in promoting the public policy of the tort. *Coleman* said *Cox*, for the *first* time,

immunized unionized employers "from accountability for violations of state public policy." *Id.* at 813 (*citing Midgett v. Sackett-Chicago, Inc.*, 105 Ill.2d 143, 150, 473 N.E.2d 1280 (1984), *cert. denied*, 472 U.S. 1032, 474 U.S. 909 (1985)). *Coleman's* citation of *Midgett* is significant. There, the Illinois Supreme Court concluded that employees were not limited to contractual remedies and required the availability of punitive damages to deter such conduct in the future.

> If there is no possibility that an employer can be liable in punitive damages, not only has the employee been afforded an incomplete remedy, but there is no available sanction against the violator of an important public policy of the state. It would be unreasonable to immunize from punitive damages an employer who unjustly discharges a union employee, while allowing the imposition of punitive damages against an employer who unfairly terminates a non-union employee. The public policy against retaliatory discharges applies with equal force in both situations.

473 N.E.2d at 1284.

There would have been no reason for *Coleman* to cite *Midgett* if it did not intend *Murphy* to allow punitive damages to be assessed in all instances of retaliatory discharge. Indeed, Southwest cannot contend that it was ignorant of the law, because no judicial decision ever sanctioned the retaliatory conduct at stake.

In the face of this very strong public policy that all employees under *Murphy* deserve the protection of the law and the deterrence of punitive damages, Southwest

resorts to the *Coleman* trial judge's erroneous interpretation of the supreme court's opinion on remand when he sustained a motion in limine to preclude punitive damages.

A federal appellate court's duty, in exercising diversity jurisdiction, is to follow a state supreme court decision changing the applicable state law. *Bradley v. Richmond School Board*, 416 U.S. 696, 713 n.17 (1974) (*citing Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 542-43 (1941)). Despite Southwest's assertion that the Tenth Circuit failed to give much, if any, weight to the *Coleman* trial judge's unpublished ruling, this Court has stated that such decisions of state trial courts are not controlling in a diversity action. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). Indeed, the Tenth Circuit has noted that unreported, unpublished decisions of state district courts are of little value in considering the course the state's highest court might take. *State Farm Mutual Auto Insurance Co. v. Travelers Indemnity Co.*, 433 F.2d 311 (10th Cir. 1970).

Southwest ignores the fact that unpublished appellate opinions have no precedential value and are not citable in Kansas courts. Kansas Supreme Court Rule 7.04 specifically states, in pertinent part:

> All memorandum opinions, unless otherwise required to be published, shall be marked: "Not Designated For Publication." *Since unpublished opinions are deemed to be without value as precedent* and are not uniformly available to all parties, opinions so marked shall not be cited as precedent by any court or in any brief or other material presented to any court, except to support a

> claim of res judicata, collateral estoppel, or law of the case. (Emphasis added.)

Petitioner attempts to ignore this prohibition by stating that federal courts follow their own procedural rules in determining the existence of state law. *See* footnote 6 to petitioner's brief. Southwest misses the point. The mandate of the Rules of Decision Act, 28 U.S.C. § 1652, is that the laws of the several states shall be regarded as rules of decisions in civil actions in the courts of the United States. This Court has held that judicial decisions are laws of the state within the definition of the act. *King v. Order of Travelers*, 333 U.S. 153, 157 (1947).

In *King*, the Court held that a federal court, applying local law in a diversity case, is not bound to follow a decision of a state trial court where such decisions are not regarded by the state courts as binding precedent. Such decisions, therefore, are not necessarily rules of decision within the meaning of the act. *Id.* at 161.

In *King*, the Court considered the relative status of a state trial court in determining to what extent a federal diversity court should pay heed to its rulings. There, this Court held that the court of common pleas in South Carolina was not a court whose pronouncements deserved controlling or even persuasive evidence on the subject of the predicted rulings of that state's highest court.

> While the Courts of Common Pleas are denominated courts of record, their decisions are not published or digested in any form whatsoever. They are filed only in the counties in which the cases are tried, and even there the sole index is by the parties' names. Perhaps because these facts preclude ready availability to bench and

> bar, the Common Pleas decisions seem to be accorded little weight as precedence in South Carolina's own courts. In this connection, respondent has submitted a certificate from the Chief Justice of the Supreme Court of South Carolina to the effect that "under the practice in this state an unappealed decision of the Court of Common Pleas is binding only upon the parties who are before the Court in that particular case and would not constitute a precedent in any other case in that Court or in any other court in the State of South Carolina."

Id. at 160.

A federal court adjudicating state law in a diversity suit is, the Court said, in effect, only another court of the state. It would be incongruous to hold a federal court bound by a decision that would not be binding on any other state court. *Id.* at 161. A practical reason for precluding such state trial court decisions is the fact that litigants can only find the decisions on any given subject only by laboriously searching all the judgment rolls in a state's counties. *Id.* To hold that a federal court must abide by such trial court decisions would put a premium on the financial ability required for exhaustive screening of all the dockets in the state, the Court said. *Id.* at 161-62. Further, "in cases where the parties could not afford such practices, the result would be often to make their rights dependent on chance; for every decision cited by counsel there might be a dozen adverse decisions outstanding but undiscovered." *Id.* at 162.

In the instant case, the Kansas Supreme Court, by rule, has determined that unpublished appellate decisions have no precedential value. Certainly unpublished decisions of Kansas trial courts, which never publish, can

have no greater precedential value and cannot be considered "rules of decision" by the federal courts. While such courts may be courts of record, they do not bind any other trial court. Southwest asks this Court to rely upon not even a written decision, but oral remarks from the bench in a matter that was settled before trial. Indeed, if the law were different, respondent would have to search all the judicial districts in Kansas to yield additional cases on this subject. However, the Tenth Circuit sufficiently interpreted the Kansas Supreme Court's intent in *Coleman* to determine the applicable law.

While Southwest contends the Tenth Circuit ignored consideration of any additional proceedings in the *Coleman* case at the trial level, the record reflects that Southwest was given an extended period of time to file its Petition for Rehearing and an oversized Petition. All the matters asserted herein were attached to Southwest's brief to the Tenth Circuit. There is no reason to believe that the Tenth Circuit did not duly consider and reject out of hand the meritless claims advanced before that court. Indeed, the Tenth Circuit was barraged on rehearing with new constitutional issues about the Eighth Amendment, the due process and equal protection clauses, as well as a host of factual and legal issues never before raised. Many of these arguments have the clear appearance of an afterthought.

A case in point is Southwest's suggestion that the question of law herein be certified to the Kansas Supreme Court. No such suggestion had ever been made until an adverse ruling by the Tenth Circuit panel. Counsel herein specifically recalls previous appellate counsel for Southwest Forest informing the Tenth Circuit that Southwest

had considered and rejected the certification option, even after the court's order for supplemental briefing, and did not request the same at oral argument. Plaintiff's counsel objected to certification because of the additional delay that would entail.

Southwest's suggestion that the Tenth Circuit was indifferent to Kansas law because no party requested certification unfairly characterizes the studied resolution of this case by the court below.[3] Certification is a matter of discretion and is not obligatory on the federal courts. In *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974), this Court said "the mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit. We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory." *Id.* at 390-91. No abuse of discretion occurred in this area.

Finally, Southwest's tangential reference to equal protection in its argument head, but without any citation of authority in its petition, constitutes a waiver of any apparent constitutional issue. Moreover, no such issue was timely raised before the court below.

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[3] Southwest's complaint about certification ought to be subject to estoppel by virtue of its failure to request the same before judgment. *See Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988)("We note the plaintiff did not request certification until after the district court made a decision unfavorable to her.")

CONCLUSION

Respondent would respectfully submit that this case presents no significant and important reason for granting a writ of certiorari. At best, this is a singular case, the conclusion of which will serve the public policy of Kansas in deterring employers like Southwest from similar discharges. This is the only published decision to date since the tort was created in 1981 to result in a jury verdict. Petitioner has taken the same shabby corporate conduct throughout the trial and appeal of this matter and attempted to clothe it with new legal and factual arguments at every turn. Unraveling these arguments, however, leaves Southwest stripped of its "ignorance of the law" veil to expose the same misconduct that led the jury in this case to award punitive damages. The court below did not abuse its discretion in affirming that determination.

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